154 U.S. 495

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1147.

J. TWING BROOKS, EXECUTOR AND TRUSTEE OF ESTATE OF ROBERT HANNA, DECEASED, APPELLANT,

vs.

F. A. RAYNOLDS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(15,531.)

8

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No. 110.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 4743. In Equity.

J. TWING BROOKS, Executor and Trustee of Estate of Robert Hanna, Deceased, Appellant,
vs.
F. A. RAYNOLDS, Appellee.

On appeal from the circuit court of the United States for the northern district of Ohio, eastern division.

Record.

Estep, Dickey, Carr & Goff, for appellants; Francis J. Wing, J. Wm. Ball, for appellees.

b

Memorandum of Docket Entries.

J. TWING BROOKS, Executor and Trustee of the Estate of Robert Hanna, Deceased,
v.
F. A. RAYNOLDS.
} No. 110.

1893.

April 3. Return to appeal filed.
" 21. Appearance of Estep, D., C. & G., for appellant, filed.
May 6. Appearance J. F. Wing & J. W. Ball, for appellee, filed.
" 12. 20 copies of printed record filed.
" 18. Supplemental record filed.
" " Receipt E., D., C. & G. for copies of record filed.
" " " F. J. Wing " "
" 19. 20 copies printed supplemental record filed.
" 20. Receipt of L. Maxwell, Jr., for copy sup. record filed.
" " " " " record filed.
June 5. 20 copies appellant's brief filed. Receipt filed.
" " 20 " appellee's " " " "
" 17. Argued in part.
" 19. Submitted.
Nov. 6. Decree below reversed, with costs, and bill dismissed.
Dec. 4. 20 copies petition for rehearing filed.
" " Opinion by Judge Lurton filed.

1894.

Feb'y 5. Order denying petition for rehearing.
" " Opinion by Judge Lurton filed denying petition for rehearing.

1 United States Circuit Court of Appeals for the Sixth Circuit.

Record.

THE UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States, within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in February, being the seventh day of said month, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and seventeenth.

Present: The Honorable Augustus J. Ricks, United States district judge.

Among the proceedings then and there had were the following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA. } Equity. No. 4743.

Be it remembered, that heretofore, to wit, on November
2 20, A. D. 1889, a bill of complaint was filed in the office of the clerk of this court, which bill reads, and is in, the words and figures following, to wit:

Bill of Complaint.

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee, Defendants. } In Equity.

To the honorable judges of the circuit court in and for the said district and division:

F. A. Raynolds, of the State of Colorado, brings this bill against Cassius B. Hanna, Hattie L. Hanna, and J. Twing Brooks, trustee, and thereupon your orator complains and says that he is a resident of the State of Colorado, and is a citizen of said State of Colorado. That the said Cassius B. Hanna, Hattie L. Hanna, and J. Twing Brooks, trustee, are all citizens of the State of Ohio, and residents of the said northern district of Ohio, and eastern division therein.

And your orator further shows that, at the April term, 1888, of the court of common pleas, in and for Cuyahoga county, and State of Ohio, in a cause then pending therein, in which F. A. Raynolds, assignee of Hartzell Brothers, was plaintiff, and the said Cassius B. Hanna and Hattie L. Hanna were defendants, a judgment was rendered in favor of said F. A. Raynolds, assignee of Hartzell Brothers, against said C. B. Hanna and Hattie L. Hanna, defend-

ants, in the sum of $44,941.60. That said judgment is wholly unsatisfied, and in full force and effect. That, after said action
3 was begun, under and in accordance with the laws of the State of Colorado, the action then pending, and the notes upon which said judgment was obtained, were sold at public sale for the benefit of the estate of Hartzell Brothers, insolvents, to one Shaffer, and that afterwards, and after said estate had been settled, and final account filed by mesne assignment, the said complainant herein, F. A. Raynolds, for a valuable consideration by him paid, became the owner of said judgment, and is still the owner thereof.

And your orator further shows that said Cassius B. Hanna and Hattie L. Hanna have no property, real or personal, upon which levy of execution can be made, and that execution on said judgment has been heretofore issued and returned *nulla bona*.

And your orator further shows that the defendant Cassius B. Hanna is the son of Robert Hanna, deceased, and is one of his heirs-at-law. That the said Robert Hanna, father of said Cassius B. Hanna, died on or about the third day of April, 1882. That prior to his death he made and executed a last will and testament and codicil thereto, which was duly admitted to probate in the probate court of Cuyahoga county; and that the defendant, J. Twing Brooks, named as trustee in said will and also as executor, was duly qualified as executor of said will and accepted the trust created by said will and entered upon the discharge of his duties as such executor and trustee, and still is acting as such trustee and executor, under the provisions of said will.

And your orator further shows that by said last will and testament there was devised and bequeathed to J. Twing Brooks in trust all of the property, both real and personal, of any and every description which the said Robert Hanna owned or held at the time of his death. That by the terms of the trust in said will described,
4 the said J. Twing Brooks, as trustee, was given the full, ample and complete power to manage, direct and control the said estate, and every part thereof, according to his own best judgment and discretion; and also to rent, sell or improve the whole or any part of any real estate belonging to said estate, and in such manner and upon such terms and conditions as he might think best, and to make, execute and deliver deed or deeds in fee of said property, and to transfer and sell *and* (all) personal property, stock, bonds or chattels of any kind whatsoever either at public or private sale and invest and reinvest from time to time in such manner and in such property, whether real or personal, as he might deem best; it being expressly the wish of the testator in said will to invest the said trustee therein named as executor with power to manage and control the entire estate left by the decedent according to his own judgment and discretion, the same as the said testator could himself do if living, and subject only to and be restained only by the special limitations imposed and expressed in said will. And your orator further shows that in said last will and testament, as one of the special limitations imposed upon said trustee, was the following provision:

Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son Cassius shall so request, to purchase a home for him at a cost not to exceed $12,000.00, taking title to himself as executor and trustee as aforesaid; the same to be kept as and for a home for Cassius free from rent so long as he desires to so occupy the same, and in the final settlement of my estate as hereinafter provided, I direct that the money expended by my executor in insurance, taxes, and the assessments on the house so occupied by Cassius, together with six per cent. interest per annum on the cost of said home, if at the time it shall be so occupied by him, shall be deducted from the amount that is to be paid for Cassius or his children as hereinafter provided; or if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments and interest from the annual income that is to be paid to Cassius or his children as hereinafter provided, he is authorized and directed to do so. As a further provision and limitation imposed upon said trust in said last will and testament, it was directed that the income of the estate each year shall be applied as follows:

1. To the payment of taxes, insurance assessments and repairs that may be levied or become necessary to be made on any part of the estate, together with the necessary expense of the administration of the same, including the compensation provided to be paid to the executor.

2. To the payment of the annuity of $2,000 to the wife of said testator, who died on or about January 12, 1883.

3. After the payment of all the items hereinbefore mentioned, the remainder of the yearly income or increase of the estate that should be collected or received should be divided into two equal parts; one part to be expended by the executor for the benefit of said Cassius B. Hanna and his family so long as the said Cassius should live; or in case the said executor should deem it proper and best, and in no event otherwise, the said executor should pay the whole or any part of such portion of the yearly net income of the estate, subject to the deductions hereinbefore mentioned for insurance, taxes, assessments and interest on the cost of the home thereinbefore granted, to the said Cassius B. Hanna, in cash.

And your orator further shows that by the codicil to said will, dated the thirtieth day of May, 1874, it was provided in item two as follows: That to settle definitely and make forever free from dispute that portion of item eight of my said will, which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son Cassius and his family, is to be so expended for his benefit only until the time arises when the final distribution of my estate shall be made under the provision of said will. And to this extent are the words in said will directing said portion of income to be expended for his benefit so long as he, Cassius, shall live, to be modified and controlled. Also that the one-half of said annual income which is to

be expended for the benefit of Cassius as aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my executor in his possession in trust to the end that the same may be applied as my said executor shall deem it best, and not otherwise, for the benefit of my son Cassius and his family. Also that any portion of said share of income which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession in trust by said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amount as he, my said executor, may deem it best, and not otherwise. And in item four of said codicil it is directed that no interest be charged on excess of advances. And your orator further shows that on or about the fifteenth day of November, 1884, under and in accordance with the directions and provisions and limitations contained in said will, the said defendant, J. Twing Brooks, acting as the executor of said estate of Robert Hanna, at the request of said defendant, Cassius B. Hanna, caused to be built a dwelling-house upon certain lands, formerly owned by said Robert Hanna, the title of which had passed to said J. Twing Brooks, as executor and trustee under the provisions of said will. That the said land upon which the said dwelling-house was builded is described as follows: as being sublot 2 of William Van Leek's subdivision of part of original lot 400, East Cleveland township, and a part of original lot 408, Newburgh township, now Cleveland city, as the same is recorded in
7 volume 1 of maps, page 43, and is 107 feet front on Euclid avenue, as described in the deed recorded in volume 213, records of deeds, Cuyahoga county, page 190.

And your orator further shows that the said house built upon said land hereinbefore described was devoted by the said trustee, J. Twing Brooks, to the uses of said Cassius B. Hanna as a home, to be kept as and for a home for the said Cassius, free of rent under the terms and provisions of said will; and that the house and land and the use thereof were accepted by said Cassius B. Hanna as a home; and the building of said house by said trustee on said land and the devotion of said house and land to the uses of said Cassius as aforesaid, were accepted by the said Cassius as the fulfillment and performance of the trust created for his benefit by said last will and testament; and the said house and lands have been occupied by said Hanna as a home ever since the time of its construction.

And your orator further says that the said Cassius B. Hanna has, by reason of the premises, an equitable life estate in and to said land and buildings hereinbefore described subject in equity of the payment of said judgment.

And your orator further says that under the provisions of said will, that the said J. Twing Brooks, as executor and trustee, holds the said estate, amounting from $150,000 to $200,000 in real and personal property, in trust, to pay to the said Cassius B. Hanna, or for his benefit, one-half of the net income arising from said estate, and that said Cassius B. Hanna as *cestui que trust*., is entitled to receive from said J. Twing Brooks, as executor and trustee, one-half of the yearly income or increase of the said estate of Robert Hanna.

And it has been paid to the said Cassius B. Hanna by said executor and trustee from time to time since the death of the said Robert Hanna; and the future payment of said income is a charge upon the estate and assets in the hands and under the control of the said J. Twing Brooks, executor and trustee.

8 And your orator further shows that by reason of the premises he is entitled to have said equitable life estate in said premises hereinbefore described, and such right to receive one-half said annual net income arising from the estate of said Robert Hanna subjected to the payment of his said judgment.

And your orator expressly charges that both the said Cassius B. Hanna and said J. Twing Brooks, executor and trustee, refuse and neglect to apply any of the said net income arising from the said estate to the payment of the judgment of the plaintiff, and refuse and neglect to apply the said life estate of Cassius B. Hanna in said building and premises hereinbefore described, to the payment of the judgment of your orator; all which actions and doings are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator. To the end, therefore, that the defendants may, if they can, show reason why your orator should not have the relief hereby prayed, and that they may make a full disclosure and discovery of all the matters aforesaid, and upon their corporal oaths and according to the best and utmost of their knowledge, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, and particularly, to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are required to answer, that is to say:

1. Whether the said judgment was rendered in favor of F. A. Raynolds, assignee of Hartzell Brothers, against them, the said C. B. Hanna and Hattie L. Hanna as aforesaid.

2. Whether said judgment has been paid or satisfied.

3. Whether the said Robert Hanna made and executed a will and codicil thereto as aforesaid.

4. Whether said will was admitted to probate as aforesaid,

9 and whether said J. Twing Brooks was duly qualified as executor of said will and accepted the position of trustee thereunder, and entered upon the discharge of his duties as such executor and trustee, and whether he still occupies the position of trustee under the provisions of said will.

5. Whether the said J. Twing Brooks, acting as such executor of said estate of said Robert Hanna, at the request of said defendant, Cassius B. Hanna, caused to be built the dwelling-house upon the lands described as and for a home for said Cassius B. Hanna.

6. What the said one-half of the net annual income arising from the estate of Robert Hanna, deceased, amounts to per annum.

And that the said defendants may answer the premises, your orator prays that the said life estate of said defendant, Cassius B. Hanna, may be subjected to the payment of the judgment of the complainant, either by appraisement and sale or by the appointment of a receiver to take and hold said premises and apply the in-

come and rental arising therefrom to the payment of the judgment of your orator as to your honors may seem best, and that an account may be taken of one-half of the net annual income arising *for* the estate of said Robert Hanna; and that the said one-half of the net annual income from said estate be directed to be applied to the payment of the judgment of your orator hereinbefore described.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to the said Cassius B. Hanna, Hattie L. Hanna and J. Twing Brooks, trustee, commanding them on a day certain therein to be named, to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem meet, and may be required by the principles of equity and good conscience.

FRANCIS J. WING,
J. WM. BALL,
Solicitors for Complainant.

10 *Note.*

The defendants are required to answer each of the foregoing interrogatories numbered one to six, inclusive.

UNITED STATES OF AMERICA, }
Northern District of Ohio. }

Before me the subscriber duly qualified to administer oaths, personally came J. William Ball, and says that he is one of the duly authorized attorneys of the complainant, who is a non-resident and absent from said district, who being duly sworn, deposes and says that so far as the statements herein contained are within his own knowledge they are true, and so far as they are derived from the information of others, he verily believes them to be true.

J. WM. BALL.

Sworn to and subscribed before me this twentieth day of November, 1889.

[SEAL.] A. R. MANNING,
Notary Public.

Tax fee, 40c.

Subpœna.

Afterwards, to wit, on November 20, 1889, a subpœna was issued out of the office of the clerk of this court, which subpœna reads and is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Eastern Division, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Cassius B. Hanna, Hattie L. Hanna and J. Twing Brooks, trustee, if they be found in your

district, to be and appear in the circuit court of the United
11 States, within and for the district aforesaid, at Cleveland, on the first Monday in February next, to answer a certain bill in chancery filed and exhibited in said court against them by F. A. Raynolds.

Hereof they are not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this twentieth day of November, A. D. 1889, and in the one hundred and fourteenth year of the Independence of the United States of America.

[SEAL.] MARTIN W. SANDERS, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday in January, 1890, otherwise the said bill may be taken *pro confesso.*

MARTIN W. SANDERS, *Clerk.*

Which said subpœna had the following endorsement thereon: No. 4743. United States circuit court, northern district of Ohio, eastern division. In chancery. F. A. Reynolds *vs.* Cassius B. Hanna *et al.* Subpœna. Returnable January 6, 1890. Rule day for appearance, January 6, 1890. Rule day for answer, February 3, 1890. Returned and filed December 5, 1889. M. W. Sanders, clerk. Francis J. Wing and J. Wm. Ball, complainant's solicitors.

Which said subpœna had the further endorsement thereon: Fifty dollars has been deposited as security for costs for which the complainant may be liable in this suit.

Afterwards, to wit, on November —, A. D. 1889, said subpœna was returned and filed in the office of the clerk of this court, with the following marshal's return endorsed thereon:

NORTHERN DISTRICT OF OHIO, *ss:*

On the seventh day of November, 1889, at Cleveland, O., I made due service of this writ by delivering a true and duly
12 certified copy thereof to the within-named Hattie L. Hanna, and by leaving a like copy at the usual place of abode of the within-named Cassius B. Hanna in the hands of his wife, Hattie L. Hanna, he being absent from home and could not be found, and on the fourth day of December, 1889, at Salem, Ohio, I made further service of this writ by leaving a like copy at the usual place of abode of the within-named J. Twing Brooks, trustee, in the hands of his son, C. T. Brooks, the said J. Twing Brooks being absent from home and could not be found.

B. F. WADE, *U. S. Marshal,*
By GEO. WYMAN AND
JAMES MOONEY, *Deputies.*

Service	$6 00
Copies	1 50
Expenses	4 75
	$12 25

Appearance.

Afterwards, to wit, on December 30, 1889, an appearance was entered herein, which appearance reads and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } Chancery. No. 4743.

We hereby enter appearance of defendant, J. Twing Brooks, in above-entitled cause.

ESTEP, DICKEY & SQUIRE,
His Attorneys.

December 30, 1889.

Answer of J. Twing Brooks.

Afterwards, to wit, on December 30, 1889, an answer was
13 filed herein, which answer reads and is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. Hanna, and Twing Brooks, Trustee, Defendants.
} Answer of J. Twing Brooks, Trustee, one of the Defendants, to the Bill of Complaint of F. A. Raynolds, Complainant.

This defendant now, and at all times hereafter, saving and reserving unto himself all benefit and advantage or exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained for answer thereto or unto so much and such parts thereof as this defendant is advised, is or are material for him to make answer unto, this defendant for answer says, "that it is true that he was and is executor and trustee of the estate of Robert Hanna, deceased, duly appointed to carry out and execute the provisions of said last will and testament of the said Hanna, referred to in the petition of complainant."

This defendant further says, that the court may be fully advised in the premises, he herein sets forth a copy of said last will and testament, with the codicil thereto, which is as follows:

I, Robert Hanna, of Cuyahoga county, Ohio, being of full age, and of disposing mind and memory, do make and publish this, my last will and testament.

Item 1. I will and direct that my funeral expenses, and all debts that I may be owing at the time of my death, shall be paid by my executor hereinafter named, out of any funds that may belong to my estate, whether the same be principal or income.

14 Item 2. To facilitate the settlement of my estate, I hereby authorize my executor to compromise, settle and adjust all debts, claims or demands that may exist in favor of or against my estate, either at the time of my death or at any time during the administration and settlement of my estate, on such terms and in such manner as he may deem best, and I hereby invest him with full power to do the same according to his own judgment and discretion.

Item 3. I devise and bequeath to my wife, Harriet A. Hanna, in case she should survive me, all household articles which may be in my possession and at my homestead at the time of my death, including furniture, carpets and all things designed for ornament or use, including also horses, carriages, domestic animals and stable furniture and equipment, the same to be used or converted by her, or disposed of in any manner she may wish, and for her own benefit. In case she should not survive me, then such articles shall be and remain a part of my estate, to be controlled by my executor like my other property, as hereinafter named.

Item 4. Excepting the household articles devised to my wife in foregoing item three, I devise and bequeath to my executor hereinafter named in trust, to be disposed of by him as hereinafter provided, all my other property, real and personal, of any and every description, wherever the same may be situated and however my interest or title in the same may be evidenced, I hereby giving my said executor full, ample and complete power to manage, direct and control the same and every part thereof, according to his own best judgment and discretion, also to rent, sell or improve the whole or any part of my real estate, and in such manner and upon such terms and conditions as he may think best, and in case of sale, either at public or private sale, as he may deem, and to make, execute and deliver deed or deeds in fee for the same; I also hereby

15 authorize and empower him to dispose of, whenever, in his judgment, it will be best for my estate so to do, any and all of my personal property, stocks, bonds, chattels of every kind, either at public or private sale, and to invest, and from time to time reinvest in such manner and in such property, whether real or personal, as he may deem best. The proceeds arising from the rent or sale of my real estate, and the income or sale of my personal estate, and in case of purchase of real estate by him as aforesaid, I direct that the title to the same be taken to himself as executor and trustee of my estate. It being my wish and purpose to invest my executor hereinafter named with power to manage and control my entire estate, according to his own judgment and discretion, the same as I could do myself, if living, and subject only to, and be restrained only by the special limitations herein imposed and expressed by me.

Item 5. I will and direct that my home on Prospect street, in

Cleveland, be kept as a home for my wife, Harriet A. Hanna, and not be sold, so long as she lives, or desires to occupy the same as a home. Should she at any time prefer to relinquish the same, and make her home elsewhere, and shall so express her wish in writing to my said executor, I authorize him to sell said homestead on Prospect street, as an entirety or otherwise, and invest the proceeds thereof for the benefit of my estate, and should my wife Harriet desire a smaller and less expensive home than the homestead on Prospect street, and shall so express her wish to my executor in writing, I hereby authorize and direct him to purchase for her such other home, he to consult her wishes in the selection of the same, and take the title thereof to himself as executor and trustee, as aforesaid, and hold the same as long as my wife shall live, or desire to make the same her home, and so long as my said wife shall elect to live in the homestead on Prospect street, I direct my exec-
16 utor to keep the house insured to the extent of $14,000 and the stable connected therewith to the extent of $1,000, and to pay the premium on the same, together with all taxes, assessments and repairs on the same, out of funds belonging to my estate, so that the same may in nowise be a charge or expense on my said wife, and I authorize my executor to insure for a suitable amount, such other home as my said wife may choose to have instead of the Prospect-street homestead, should she so elect, and to pay the premiums, together with current taxes, assessments and repairs thereon, out of funds belonging to my estate.

Item 6. I devise and bequeath to my wife, Harriet A. Hanna, $2,000 per annum during the remainder of her life, the same to be paid to her by my executor in quarterly installments of $500 each. The provision here made for my said wife, and in the foregoing items, three and five, are intended to be in lieu of a dower, and in lieu of all other statutory provision in her behalf.

Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son Cassius shall so request, to purchase a home for him at a cost not to exceed $12,000, taking title to himself as executor and trustee as aforesaid; the same to be kept as and for a home for Cassius, free from rent so long as he desires so to occupy the same. But in the final settlement of my estate, as hereinafter provided, I direct that the money expended by my executor in insurance, taxes and assessments on the home so occupied by Cassius, together with six per cent. interest per annum on the cost of said home, for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid to Cassius, or his children, as is hereinafter provided, or if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments, and interest from the annual income that is to be paid to Cassius or his children as hereinafter provided, he is hereby authorized and directed so to do.

17 Item 8. So far as the same is practicable, in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows: First, to the payment of taxes, insurance, assessments and repairs that may be levied or

become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including the compensation hereinafter provided to be paid to my executor. Secondly, to the payment of the annuity of $2,000 hereinbefore provided for my wife, Harriet A. Hanna. Thirdly, after the payment of all the items hereinbefore mentioned, I desire the remainder of the yearly income or increase of my estate, that shall be collected and received, to be divided into two equal parts; one part to be expended by my said executor for the benefit of my son Cassius and his family so long as he, Cassius, shall live; or in case my said executor shall deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate, (subject, however to the deduction hereinbefore provided to be made, of insurance, taxes, assessments and interest on the cost of the home to be provided for him as mentioned in item 7), to my son Cassius in cash. The other of the said equal parts into which the net yearly income of my estate, is to be divided as provided in this section, I direct my said executor to expend for the benefit of the children of my deceased daughter, Arrial T. Whitaker, in such manner that each of said children shall (have) an equal and the same proportion of the said part with the other. In case any of said children of my daughter, Arrial, should die without issue, before the final division of my estate, then the share of the income of my estate of such child or children so dying shall be divided between the other children of my daughter, Arrial, or the issue of them, they in such case to take *per stirpes* and not *per capita*, and in case any of said children of my daughter
18 Arrial should die before the final distribution of my estate, leaving issue, I direct that the share of the income of my estate, which would be coming to such child of Arrial if living, shall be paid to the issue of such child share and share alike, and I hereby authorize my executor to pay in cash, if he shall deem it best, the whole or any part of such share of the income of my estate as may be due to each of the children of my daughter, Arrial, as aforesaid. He to take in such case the receipt of the guardian or other person who for the time being, may be charged with the care or custody of said children or either of them for any payment so made, and in the expenditure of income for the benefit of my son Cassius and his family, as well as for the children of my daughter Arrial. I desire my executor to have in view the maintenance and the education of my grandchildren on a scale comporting with their condition and rank in life, and if in the judgment of my said executor, the net annual income of my estate as above described cannot be all properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution.

Item 9. I will and direct that my executor shall continue to control and manage my estate, and distribute, or distribute and in-

vest the annual income of my estate as hereinbefore provided, from year to year, until the youngest child of my daughter Arrial, then living, shall come of age, or until such further period as in his opinion the welfare of my son Cassius or of my grandchildren will be thereby promoted, and whenever it shall so seem prudent to my said executor, but in no event till then. I authorize and direct him to divide and distribute the whole of my estate among
19 my grandchildren, share and share alike, to each that may be living at the time of such distribution, or if before such final distribution any of my said grandchildren shall have died, leaving issue, the issue of such deceased grandchild shall take the share that would be due to such grandchild, if he or she were living, share and share alike. And I hereby authorize my executor, if at any time it shall seem suitable and prudent to him, to advance any portion of the final share of my estate to either of my said grandchildren, that would be due to them under the plan of distribution herein provided, and in such final settlement, I direct my said executor to invest a portion of the share hereinbefore provided for each of my grandchildren in a home for such grandchild, in which child shall have a life estate, with remainder to his or her heirs, it being my wish and purpose that each of my said grandchildren shall be secured in a home beyond any contingency, during the period of his or her life. Provided, however, that such final distribution of my estate shall in no event be made during the lifetime of my wife, Harriet A. Hanna, nor shall advances be made to my grandchildren, as hereinbefore provided, to such an extent as to impair the annuity of two thousand dollars, which is to be paid to my wife as aforesaid, and provided, further, that before any such advances are made, or before any advances are made as hereinafter provided, may be made to my son, Cassius, for the benefit of himself and his children, and in any event before the final distribution of the principal of my estate as aforesaid, shall be made. I wish and direct my executor to ascertain the amount of advances of money I shall have made during my lifetime to my son, Cassius, in excess of what I shall have made to my deceased daughter, Arrial, or to her and to her children together, and deduct the amount of such excess as it may exist at the time of my death, interest at the rate of six per cent. per annum being added thereto from the time of my
20 death, from the sum total of my estate, which amount so deducted shall be divided equally between the children of my daughter, Arrial, and their issue *per stirpes*, it being my wish thus to equalize between my children and the descendants of each of them, the benefits of my estate.

Item 10. In order to encourage my son Cassius to habits of business and economy, and to acquire a proper regard for property and its value, I hereby authorize my executor, in case he shall deem it prudent and proper so to do, but in no event otherwise, to make advances from the principal of my estate to my son, Cassius, for the benefit of himself and his family, in such amounts and at such times as to him, my said executor, shall deem it prudent and safe; but in no event shall such advances be made to such an extent as

to impair the annuity herein provided for my wife, nor shall they be so great in amount as combined with the excess of advances made to him during my lifetime, over those made by me to my daughter, Arrial, or to her and her children together; interest from the time of my death being added thereto at six per cent. per annum, would amount to one-half the principal sum of my estate, and provided, that the amount of any advances as aforesaid, that may be made to my son, Cassius, by my said executor, shall be deducted by my said executor from the amount that would be due to the children of my son, Cassius, under the foregoing plan of the final distribution of my estate mentioned in item nine of this, my will.

Item 11. I authorize and direct my executor to refrain from enforcing payment from either of my brothers of any note or notes which I may hold against them, or either of them at the time of my death, but he shall cancel and deliver said note or notes to them without exacting payment of any portion thereof.

Item 12. I hereby nominate and appoint my nephew, J.
21 Twing Brooks, sole executor of this my last will and testament. I hereby investing him with all and singular the powers, duties and rights that are herein conferred upon the executor and trustee of my estate, and having entire confidence in his integrity, I will and direct that the probate court require no bond to be given by him, and that the accounts and settlements required by law, or by the orders of the court, of executors and administrators, be entirely dispensed with in his administration of my estate. I desire the probate court to issue to him letters testamentary upon my estate, and allow him to execute and carry out the provisions of this, my will, without any accountability to the probate court whatever. In case his life should not be spared to complete the trust herein devolved upon him, I desire the probate court to appoint three suitable persons, who, as executors and trustees of my estate, and their successors likewise to be appointed by the probate court, shall complete the settlement of my estate and manage and distribute the same agreeably to the provisions of this, my last will, they to give bonds and be subject to the law and the orders of the court as in ordinary cases of administration.

Item 13. I hereby authorize and direct my said executor, J. Twing Brooks, as compensation for his services as executor and trustee of my estate and in lieu of the compensation fixed by law, to pay himself out of the income of my estate, or in default of income, then out of the principal of my estate, one thousand dollars per year for the first five years of his administration of the same; after the expiration of five years, for which compensation is thus named, should the value of my estate have increased, or the labor and time required in discharge of the duties of executor and trustee of my estate be increased, I will and direct that his compensation be proportionately increased, and in addition to such compensation, I authorize and direct him to pay out of the funds belonging to
22 my estate his traveling expenses and other necessary costs and expenses incurred in the management of my estate, and in carrying out the provisions of this, my last will.

Item 14. I hereby cancel, revoke and annul all former wills made by me.

The erasures in lines two and three in item two; the interlineation in line twelve, item seven; the erasure in line four, item eight; the interlineations in lines fourteen and thirty-eight, in item eight; the interlineation in line twelve, item ten; also, the interlineation in line thirty, item eight, made before signing and sealing.

In testimony whereof, I have hereto set my hand and seal this thirtieth day of May, 1876.

ROBERT HANNA.

Signed and sealed by the said Robert Hanna, and by him acknowledged to be his last will and testament, in our presence, and by us signed as witnesses in his presence and at his request.

JOHN McCLYMOND.
H. S. KAUFMAN.

I, Robert Hanna, being of sound and disposing mind and memory, do make and publish the following codicil to my foregoing will, which is dated May 30, 1876.

Item 1. Believing it to be for the best interest of my estate and all those who are, or may be interested in the same, I do hereby revoke, cancel and annul the whole of item 10 in said will beginning with the words, "In order to encourage" and ending with the words, "Item nine of this, my will," and I hereby declare said item ten (10) and every part thereof to be no longer any part of my said last will and testament.

Item 2. In order to settle definitely and make forever free from dispute that portion of item eight (8) of my said will, which relates to the division and distribution of the annual net income of
23 my estate, I hereby declare it to be (my) wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the time arrives when the final distribution of my estate shall be made under the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, "So long as he, Cassius shall live," to be modified and controlled, also that the one-half of said annual income which is to be expended for the benefit of Cassius as aforesaid shall, until expended or otherwise disposed of, as provided in said item be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my said executor shall deem best and not otherwise for the benefit of my son, Cassius, and his family. Also, that any portion of said share of income which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best and not otherwise.

Item 3. Unless my executor shall have sooner made a final dis-

tribution of my estate under the powers granted in my said will, I hereby will and direct that such final distribution be made as soon as may be, after the death of my son, Cassius, provided at the time the youngest child of my daughter, Arrial, then living, shall have reached the age of majority.

Item 4. I hereby revoke, cancel and annul so much of items eight and nine (8 and 9) in said will as requires my executor to charge annual interest at six per cent. on the excess of advances made to Cassius over those made to Arrial and to her children, and I hereby direct that no interest whatever be computed on such excess in determining the amount which shall be deducted from my
24 estate for the benefit of Arrial's children, before the final distribution of the same.

Item 5. In event that my son, Cassius, should have no children living, nor grandchildren living at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession, one-half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and at the death of Cassius, said one-half of my estate so retained and held, to be by said executor distributed *per stirpes* among the children and grandchildren of my daughter Arrial. The other half of my estate, in the event spoken of in this item, to be divided between the children and grandchildren of my deceased daughter, Arrial, in the manner set forth in my will, whenever such final settlement shall take place.

Witness my hand and seal this third day of June, A. D. 1881.

ROBERT HANNA.

And this defendant denies each, all and singular of the averments in the said complainant's petition contained, in which he pretends to set forth the contents of said will, except as the same appear in the copy of the will hereinbefore set forth. This defendant says that it is not true that he, acting as executor of said estate of Robert Hanna, at the request of said defendant, Cassius B. Hanna, caused to be built a dwelling-house upon certain lands formerly owned by the said Robert Hanna and described in said complainant's bill of complaint; neither is it true that the said house built upon said land in said complaint described was devoted by the said trustee, J. Twing Brooks, to the use of Cassius B. Hanna, to be occupied as and for a home by said Cassius B. Hanna, free from rent under the terms and provisions of said will. Neither is it
25 true that the said house and land and the use thereof were accepted by the said Cassius B. Hanna as a home. Neither is it true that the building of said house by said trustee on said land and the devotion of said house and land to the uses of the said Cassius, as aforesaid, were accepted by said Cassius as a fulfillment and performance of the trust created for his benefit by said last will and testament. Neither is it true that said house and lands have been occupied by said Hanna as a home ever since the time of its construction. Neither is it true that the said Cassius B. Hanna has

an equitable life estate in and to said lands and buildings so described in said bill of complaint, or that he has any other character of estate therein, or any right, title or property to said estate, or any interest therein. Neither is it true that said J. Twing Brooks, as executor or trustee, holds said estate or any part thereof in any amount in trust to pay the said Cassius B. Hanna any part thereof. Neither is it true that the said Cassius B. Hanna is entitled to receive from said J. Twing Brooks, as executor or trustee, one-half of the yearly income or increase of the said estate of Robert Hanna, or any part thereof. Neither is it true that the payment of any portion of the income of said estate is a charge upon the estate and assets in the hands and under the control of this defendant for the benefit of the said Cassius.

And this defendant denies that said Cassius B. Hanna or Hattie L. Hanna have any right, title, interest or claim to the estate of said Robert Hanna or any part thereof.

This defendant further answering, says that said Cassius B. Hanna never exercised the option given him in item 7 of his father's will to have a separate home purchased or constructed for his own use, and that, on the contrary, the said Cassius B. Hanna declined to make a request for a separate home for himself, and gave as a reason therefor that he could not afford to have deducted from his half of the annual net income of his father's estate six per cent.
26 on the cost thereof, and insurance, taxes and assessments which were by the will required to be deducted from the half interest that would ultimately pass to the heirs of the said Cassius B. Hanna.

This defendant says that the property described in the complainant's bill of complaint, as situated upon Euclid avenue, was owned by Robert Hanna many years prior to his death, and at the time of his death and ever since has simply treated as a part of decedent'-estate; that for two or three years following Mr. Robert Hanna's death, Cassius, his wife and two children, and the three grandchildren of the deceased daughther, Arrial, continued to occupy the old Hanna homestead on Prospect street; that during those years the net income of the estate became seriously diminished; at the same time an unusual amount of money was needed each year to keep the said property in proper condition and pay the necessary compensation to servants and for the large amount of fuel which was needed to make the house comfortable and other necessary expenses, and on this account only, and for the sake of being able to provide a comfortable home on a largely reduced scale of expenditure for all of the beneficiaries of Mr. Robert Hanna's estate, the executor and trustee built a house on Euclid-avenue lot described in complainant's petition, and from the time the same was completed to the present time the same has been owned, held and controlled as a part of the Hanna estate and made use of as a home by the grandchildren of Robert Hanna, deceased, and by Cassius Hanna's wife, and a part of the time by Cassius himself.

This defendant avers that Cassius B. Hanna left Cleveland for the West about three years ago, since which time he has had noth-

ing whatever to do with said real estate, nor personally occupied the same.

This defendant *said* that he has kept said property insured
27 and paid the taxes thereon, and kept up the repairs of the same in all respects as an integral part of the estate of said Robert Hanna, deceased, and has kept no separate account of the same, and that the children of Arrial, the deceased daughter of the said Robert Hanna, named Harriet Whitaker, Mary Whitaker and Robert H. Whitaker, have occupied said estate by permission and sufferance with the wife of the said Cassius B. Hanna and her children, but that the said property so described on Euclid avenue has not been in the possession or under the control, in any respect, of the said Cassius B. Hanna for the three years last past, and that he has no control, neither has he any right of control over the same, and that the title, interest and right of control in said property is solely in this defendant, as executor and trustee of the estate of said Robert Hanna, to be controlled under and by virtue of the provisions of the said last will and testament.

And this defendant having fully answered prays to be hence dismissed with his costs.

ESTEP, DICKEY & SQUIRE,
Attorneys for J. Twing Brooks, Executor, etc.

UNITED STATES OF AMERICA, }
The State of Ohio, Cuyahoga County, } *ss:*

J. Twing Brooks, being sworn, says that the facts set forth in his foregoing answer and the allegations therein contained are true.

J. T. BROOKS.

Sworn to before me by the said J. Twing Brooks and by him subscribed in my presence this twenty-eighth day of December, A. D. 1889.

[SEAL.] J. H. DEMPSEY,
Notary Public.

Endorsed: No. 4743. United States circuit court, northern district of Ohio, eastern division. F. A. Raynolds *vs.* Cassius
28 B. Hanna *et al.* Answer of J. Twing Brooks, executor. Filed December 30, 1889. M. W. Sanders, clerk. Estep, Dickey & Squire, attorneys for J. Twing Brooks, executor.

Extension of Time to Plead.

Afterwards, at the October, A. D. 1889 term of this court, to wit, on January 22, 1889, an order was made and entered herein, which order reads and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
C. B. HANNA *et al.* } Chancery. No. 4743.

In this cause the time in which complainant has to plead is extended sixty days. This extension not to delay hearing of cause in any manner.

Continuances.

Afterwards, at the October, A. D. 1889 term of this court, to wit, on January 29, 1890, this cause was continued to the next term of this court.

Afterwards, at the February, A. D. 1890 term of this court, to wit, on Saturday March 1, 1890, this cause was continued to the next term of this court.

Continuances Set Aside and Time to Plead Extended.

Afterwards, at the same term of this court, to wit, on Monday, March 24, 1890, an order was made and entered herein, which order reads and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
C. B. HANNA *et al.* } Chancery. No. 4743.

29 In this cause the continuance heretofore entered herein is hereby vacated and set aside, and thereupon, upon application of complainant, leave is given him to plead in thirty days, and this case is continued to the next term of this court.

Demurrer to Answer of J. Twing Brooks.

Afterwards, to wit, on April 18, 1890, a demurrer was filed herein, which demurrer reads and is in the words and figures following, to wit:

United States Circuit Court, Norther District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee. } Demurrer to the Answer of J. Twing Brooks, Trustee.

And now comes the complainant, F. A. Raynolds, by his solicitors, and demurrers to the answer of J. Twing Brooks, trustee, filed herein, for the reason that the said answer does not contain averments sufficient in law or equity to constitute a defense to the cause of the complainant as disclosed by his bill.

J. WM. BALL,
FRANCIS J. WING,
Solicitors for Complainant.

Endorsed: No. 4743. F. A. Raynolds, complainant, *vs.* Cassius B. Hanna *et al.* Demurrer to answer of J. Twing Brooks, trustee. Filed April 18, 1890. M. W. Sanders, clerk. J. Wm. Ball, Francis J. Wing, solicitors for complainant.

Pro Confesso.

Afterwards, to wit, on April 18, 1890, an order was made
30 and entered herein, which order reads and is in the words and figures following, to wit:

F. A. Raynolds, Complainant,
vs.
Cassius B. Hanna, Hattie L. Hanna, and J. Twing Brooks, Trustee. } Chancery. No. 4743.

The bill of complaint in this cause having been filed on the twentieth day of November, A. D. 1889, and it appearing that all the defendants have been duly served with process, and it further appearing that the defendants, Cassius B. Hanna and Hattie L. Hanna have failed to plead, answer or demur to the bill, and that the time for answer thereto has expired. It is ordered that the said bill of complaint be taken as confessed by the said defendants, Cassius B. Hanna and Hattie L. Hanna, and that a *pro confesso* be entered against them.

April 18, 1890.

J. WM. BALL,
FRANCIS J. WING,
Solicitors for Complainant.

Continuance.

Afterwards, at the April, A. D. 1892 term of this court, to wit, on August 25, 1890, this cause was continued to the next term of this court.

Demurrer Overruled.

Afterwards, at the October, A. D. 1890 term of this court, to wit, on December 26, 1890, an order was made and entered herein, which order reads and is in the words and figures following, to wit:

F. A. Raynolds
vs.
Cassius B. Hanna *et al.* } Chancery. No. 4743.

This day came the parties, by their counsel, and came on
31 for hearing complainant's demurrer to the answer of J. Twing Brooks, trustee herein, and the same was argued by counsel and due consideration being given by the court, it is ordered that said demurrer be overruled.

Continuance.

Afterwards, at the October term, A. D. 1890, of this court, to wit, on January 9, 1890, this cause was continued to the next term of this court.

Separate Answer of Hattie L. Hanna.

Afterwards, to wit, on January 24, 1891, an answer was filed herein, which answer reads and is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division Thereof.

FRANCIS A. RAYNOLDS, Plaintiff,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Executor, etc., Defendants.
} Separate Answer of Hattie L. Hanna.

And now comes the above-named, Hattie L. Hanna, wife of Cassius B. Hanna, and for answer to the petition and complaint of plaintiff herein says: That the said Cassius B. Hanna, her husband, has not resided within the city of Cleveland or State of Ohio since the filing of the petition herein; that her said husband, was not a resident of the city of Cleveland or the State of Ohio, at the time of the service of summons herein, and for answer to the several matters and things set forth in the petition and bill of complaint of the plaintiff herein, she avers that all the several matters and things
32 set forth in the answer of her codefendant, J. Twing Brooks, are true as therein stated, and she makes each and all the averments and statements of the answer of the said J. Twing Brooks a part of her answer herein, the same as if herein set forth and fully written.

She denies each and all of the averments of the petition and bill of complaint that are denied by the answer of the said J. Twing Brooks, and avers that the said allegations in the plaintiff's petition, denied by the said J. Twing Brooks, are untrue, and avers that the affirmative statements of fact made by the said J. Twing Brooks, as executor, as therein set forth, are true.

And this answering defendant therefore prays to be hence dismissed with her costs.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for Defendants.

THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } *ss:*

Hattie L. Hanna being first duly sworn, says that she is one of the defendants in the above-entitled cause, and that the facts stated, and the allegations contained in her foregoing separate answer, are true as she verily believes.

HATTIE L. HANNA.

Signed by the said Hattie L. Hanna, in my presence, and by her sworn to before me this twenty-fourth day of January, 1891.

[SEAL.] C. H. GALE,
Notary Public.

Endorsed: No. 4743. In United States circuit court. Francis A. Raynolds, plaintiff, *vs.* Cassius B. Hanna *et al.*, defendants. Separate answer of Hattie L. Hanna. Filed January 24, 1891. Martin W. Sanders, clerk. Estep, Dickey, Carr & Goff, attorneys for defendants.

Continuance.

Afterwards, at the February, A. D. 1891, term of this
73 court, to wit, on February 26, 1891, this cause was continued to the next term of this court.

Reply to Answer of Hattie L. Hanna.

Afterwards, to wit, on April 18, 1889, a reply to the answer of Hattie L. Hanna was filed herein, which reply reads and is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA *et al.*, Defendants. } In Equity. No. 4743.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the answer of Hattie L. Hanna, for replication thereto, says that he will aver and prove said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto, without this, that any matter or thing whatsoever in the said answer is certain material or effective in law to be replied unto, confessed and avoided, traversed or denied, is true; all which things this repliant is and will be ready to aver and prove, as this honorable court may direct, and hereby prays as in and by the original bill he has already prayed.

FRANCIS J. WING,
J. WM. BALL,
Solicitors for Complainant.

Endorsed: No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Reply to answer of Hattie L. Hanna. Filed April 8, 1891. Irvin Belford, clerk United States circuit court. F. J. Wing, J. Wm. Ball, solicitors.

34 *Reply to Answer of J. Twing Brooks.*

Afterwards, to wit, on April 8, 1891, a reply was filed herein, which reply reads and is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA *et al.*, Defendants. } In Equity. No. 4743.

This repliant, F. A. Raynolds, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the answer of J. Twing Brooks, trustee, for replication thereto, says that he will aver and prove said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto, without this, that any other matter or thing whatsoever in the said answer is certain, material, or effective in law to be replied unto, confessed and avoided, traversed or denied, is true; all which things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by the original bill he has already prayed.

FRANCIS J. WING,
J. WM.. BALL,
Solicitors for Complainant.

Endorsed: No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Reply to answer of J. Twing Brooks, trustee. Filed April 8, 1891. Irvin Belford, clerk United States circuit court. F. J. Wing and J. Wm. Ball, solicitors.

Order Appointing Special Master.

35 Afterwards, at the April, A. D. 1893, term of this court, to wit, on July 29, 1891, an order was made and entered herein, which order reads, and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } Chancery. No. 4743.

An interlocutory order for a referenee to a special master being necessary to a final decree, it is accordingly ordered that Irvin Belford, for special reasons, to wit, because of his experience in such matters and the consent of the parties, be and he is hereby appointed special master herein to ascertain and report at the next term of court, as follows:

1. What the estate of Robert Hanna, deceased, consisted of on November 20, 1889, the date complainant's bill was filed.

2. Whas has been the net income annually arising therefrom since said date after paying the taxes and other charges, as directed by the eighth item of said will, and what is the present net income of said estate.

3. How or in what manner said net income has been applied or disposed of by the executor and trustee, and what portion of the one-half thereof has been advanced to or appropriated towards the support of said Cassius B. or for himself and family, and what portion thereof has been invested for his benefit before and since the twentieth of November, 1889. The master will also ascertain and report when the youngest child of the testator's daughter, Arrial, will arrive at majority, and such other facts as either side may deem material and important in arriving at the "quantum" of Cassius' interest in the designated trust fund. The master is authorized to call before him the executor, the defendant, Brooks, and to require the production of his books and accounts as such executor and trustee for examination and inspection, touching the matters referred to.

36 And on motion of the defendant, by his solicitor, leave is granted to said defendant to file herein an amended answer within ten days, and defendants, as a condition of said leave, are required to procure the original answer of J. Twing Brooks, or a copy thereof, and file the same with the clerk, and also furnish complainant's solicitor with a copy of said amended answer within said ten days.

To which order and leave to amend, complainant, by his solicitor, excepted.

Amended Answer of J. Twing Brooks.

Afterwards, to wit, on August 4, 1891, an amended answer was filed herein, which amended answer reads and is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee, Defendants. } Amended Answer.

The above-named, J. Twing Brooks, one of the defendants herein, by leave of court, first had and obtained for amended answer to the bill of complaint, of the said F. A. Raynolds, says that this defendant now and at all times hereafter, saving and reserving unto himself all benefit and advantage or exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint for answer

thereto, or unto so much and such parts thereof as this defendant is advised, is or are material for him to make answer unto, this defendant for answer says, that it is true that he was and is ex-
37 ecutor and trustee of the estate of Robert Hanna, deceased, duly appointed to carry out and execute the provisions of said last will and testament of the said Hanna, referred to in the petition of complainant.

This defendant further says that the court may be fully advised in the premises he herein sets forth a copy of said will and testament, with the codicil thereto, which is as follows:

I, Robert Hanna, of Cuyahoga county, Ohio, being of full age, and disposing mind and memory, do make and publish this, my last will and testament.

Item 1. I will and direct that my funeral expenses, and all debts that I may be owing, at the time of my death, shall be paid by my executor hereinafter named, out of any funds that may belong to my estate, whether the same be principal or income.

Item 2. To facilitate the settlement of my estate, I hereby authorize my executor to compromise, settle and adjust all debts, claims or demands that may exist in favor of, or against my estate, either at the time of my death, or at any time during the administration and settlement of my estate, on such terms and in such manner as he may deem best, and I hereby invest him with full power to do the same according to his own judgment and discretion.

Item 3. I devise and bequeath to my wife, Harriet A. Hanna, in case she should survive me, all household articles which may be in my possession and at my homestead at the time of my death, including furniture, carpets and all things designed for ornament or use, including also horses, carriages, domestic animals and stable furniture and equipment, the same to be used or converted by her, or disposed of in any manner she may wish, and for her own benefit. In case she should not survive me, then such articles shall be and remain a part of my estate, to be controlled by my executor, like my other property, as hereinafter named.

38 Item 4. Excepting the household articles devised to my wife in foregoing item three, I devise and bequeath to my executor hereinafter named, in trust, to be disposed of by him as hereinafter provided, all my other property, real and personal, of any and every description, wherever the same may be situated, and however my interest or title in the same may be evidenced, I hereby giving my said executor full, ample, and complete power to manage, direct and control the same, and every part thereof, according to his own best judgment and discretion; also to rent, sell or improve the whole or any part of my real estate, and in such manner, and upon such terms and conditions as he may think best; and in case of sale, either at public or private sale; as he may deem best, and to make, execute and deliver deed or deeds in fee for the same; I also hereby authorize and empower him to dispose of, whenever in his judgment it will be best for my estate so to do, any and all of my personal property, stocks, bonds, chattels of every kind, either at public or private sale, and to invest, and from time to time, re-

penditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter, Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life, and if, in the jndgment of my said executor, the net
42 annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain, after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution.

Item 9. I will and direct that my executor shall continue to control and manage my estate, and distribute and invest the annual income of my estate as hereinbefore provided, from year to year, until the youngest child of my daughter Arrial then living shall come of age, or until such further period as in his opinion the welfare of my son Cassius or of my grandchildren will be thereby promoted, and whenever it shall so seem prudent to my executor, but in no event till then, I authorize and direct him to divide and distribute the whole of my estate among my grandchildren, share and share alike, to each that may be living at the time of such distribution, or if before such final distribution any of my said grandchildren shall have died, leaving issue, the issue of such deceased grandchild shall take the share that would be due to such grandchild, if he or she were living, share and share alike. And I hereby authorize my executor, if at any time it shall seem suitable and prudent to him, to advance any portion of the final share of my estate to either of my grandchildren, that would be due to them under the plan of distribution herein provided, and in such final settlement I direct my said executor to invest a portion of the share hereinbefore provided for each of my grandchildren in a home for such grandchild, in which said child shall have a life estate, with the remainder to his or her heirs, it being my wish and purpose that each of my said grandchildren shall be secured in a home beyond any contingency, during the period of his or
43 her life. Provided, however, that such final distribution of my estate shall in no event be made during the lifetime of my wife, Harriet A. Hanna, nor shall advances be made to my grandchildren, as hereinbefore provided, to such an extent as to impair the annuity of two thousand dollars, which is to be paid to my wife as aforesaid, and provided, further, that before any such advances are made, or before any advances are made as hereinafter provided may be made, to my son, Cassius, for the benefit of himself and his children, and in any event before the final distribution of the principal of my estate, as aforesaid shall be made, I wish and direct my executor to ascertain the amount of advances of money I shall have made during my lifetime to my son, Cassius, in excess of what I shall have made to my daughter, Arrial, or to her and to her children together, and deduct the amount of such excess as it may exist at the time of my death, interest at the rate of six per

cent. per annum being added thereto from the time of my death, from the sum total of my estate, which amount so deducted, shall be divided equally between the children of my daughter, Arrial, and their issue *per stirpes*, it being my wish thus to equalize between my children and the descendants of each of them the benefits of my estate.

Item 10. In order to encourage my son Cassius to habits of business and economy, and to acquire a proper regard for property and its value, I hereby authorize my executor, in case he shall deem it prudent and proper so to do, but in no event otherwise, to make advances from the principal of my estate to my son, Cassius, for the benefit of himself and his family, in such amounts and at such times as to him, my said executor, shall seem it prudent and safe; but in no event shall such advances be made to such an extent as to impair the annuity herein provided for my wife, nor shall they be so great in amount as combined with the excess of ad-
44 vances made to him during my lifetime, over those made by me to my daughter, Arrial, or to her and her children together; interest from the time of my death being added thereto at six per cent. per annum, would amount to one-half the principal sum of my estate, and provided, that the amount of any advances as aforesaid, that may be made to my son, Cassius, by my said executor, shall be deducted by my said executor from the amount that would be due to the children of my son, Cassius, under the foregoing plan of the final distribution of my estate mentioned in item nine of this, my will.

Item 11. I authorize and direct my executor to refrain from enforcing payment from either of my brothers of any note or notes which I may hold against them, or either of them, at the time of my death, but he shall cancel and deliver said note or notes to them without exacting payment of any portion thereof.

Item 12. I hereby nominate and appoint my nephew, J. Twing Brooks, sole executor of this, my last will and testament; I hereby investing him with all and singular the powers, duties and rights that are herein conferred upon my executor and trustee of my estate; and having entire confidence in his integrity, I will and direct that the probate court require no bond to be given by him, and that the accounts and settlements required by law, or by the orders of the court, of executors and administrators, be entirely dispensed with in his administration of my estate. I desire the probate court to issue to him letters testamentary upon my estate, and to allow him to execute and carry out the provisions of this, my will, without any accountability to the probate court whatever. In case his life should not be spared to complete the trust herein devolved upon him, I desire the probate court to appoint three suitable persons, who, as executors and trustees of my estate, and their successors, likewise to be appointed by the probate court, shall complete
45 the settlement of my estate and manage and distribute the same agreeably to the provisions of this, my last will, they to give bonds and to be subject to the law and the orders of the court as in ordinary cases of administration.

Item 13. I hereby authorize and direct my said executor, J. Twing Brooks, as compensation for his services as executor and trustee of my estate, and in lieu of the compensation fixed by law, to pay himself out of the income of my estate, or in default of income, then out of the principal of my estate, one thousand dollars per year for the first five years of his administration of the same; after the expiration of five years, for which compensation is thus named, should the value of my estate have increased, or the labor and time required in discharge of the duties of executor and trustee of my estate be increased, I will and direct that his compensation be proportionately increased, and, in addition to such compensation, I authorize and direct him to pay out of the funds belonging to my estate his traveling expenses and other necessary costs and expenses incurred in the management of my estate, and in carrying out the provisions of this, my last will.

Item 14. I hereby cancel, revoke and annul all former wills made by me.

The erasures in lines two and three and in item two; the interlineations in line twelve, item seven; the erasure in line four, item eight; the interlineations in lines fourteen and thirty-eight, in item eight; the interlineation in line twelve, item ten; also, the interlineation in line thirty, item eight, made before signing and sealing.

In testimony whereof, I have hereunto set my hand and seal this thirtieth day of May, 1876.

ROBERT HANNA.

Signed and sealed by the said Robert Hanna and by him acknowledged to be his last will and testament, in our pres-
46 ence, and by us signed as witnesses in his presence and at his request.

JOHN McCLYMOND.
H. S. KAUFMAN.

I, Robert Hanna, being of sound and disposing mind and memory, do make and publish the following codicil to my foregoing will, which is dated May 30, 1876.

Item 1. Believing it to be for the best interest of my estate and of all those who are or may be interested in the same, I do hereby revoke, cancel and annul the whole of item 10 in said will, beginning with the words "in order to encourage," and ending with the words, "item nine of this my will," and I hereby declare said item ten (10) and every part thereof to be no longer any part of my said last will and testament.

Item 2. In order to settle definitely and make forever free from dispute that portion of item eight (8) of my said last will, which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be (my) wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the

time arrives for the final distribution of my estate shall be made under the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, "so long as he, Cassius, shall live," to be modified and controlled; also that the one-half of the said annual income which is to be expended for the benefit of Cassius as aforesaid shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession and trust, to the end that the same may be applied as my said executor shall deem best, and not otherwise for the benefit of my son, Cassius, and his family.

Also, that any portion of said share of income which may be
47 invested for the benefit of Cassius shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise.

Item 3. Unless my executor shall have sooner made a final distribution of my estate under the powers granted in my said will, I hereby will and direct that such final distribution be made as soon as may be, after the death of my son, Cassius, provided at that time the youngest child of my daughter, Arrial, then living, shall have reached the age of majority.

Item 4. I hereby revoke, cancel and annul so much of items eight and nine (8 and 9) in said will as requires my executor to charge annual interest at six per cent. on the excess of advances made to Cassius over those made to Arrial and her children, and I hereby direct that no interest whatever be computed on such excess in determining the amount that shall be deducted from my estate for the benefit of Arrial's children before the final distribution of the same.

Item 5. In event that my son, Cassius, should have no children living, nor grandchildren living at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession, one-half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and at the death of Cassius, said one-half of my estate so retained and held, to be by said executor distributed *per stirpes* among the children and grandchildren of my daughter Arrial. The other half of my estate, in the event spoken of in this item, to be divided between the children of and grandchildren of my deceased daughter, Arrial, in the manner set forth in my will, whenever such final settlement shall take place.

48 Witness my hand and seal this third day of June, A. D. 1881.

ROBERT HANNA.

And this defendant denies each, all and singular of the averments in said complainant's petition contained, in which he pretends to set forth the contents of said will, except as the same appear in the copy of the will hereinbefore set forth. This defendant says that it

is not true that he, acting as the executor of said estate of Robert Hanna, at the request of said defendant, Cassius B. Hanna, caused to be built a dwelling-house upon certain lands formerly owned by the said Robert Hanna and described in said complainant's bill of complaint; neither is it true that the said house built upon said land in said complaint described was devoted by the said trustee, J. Twing Brooks, to the use of said Cassius B. Hanna, to be occupied as and for a home by said Cassius B. Hanna, free of rent under the terms and provisions of said will. Neither is it true that the said house and land and the use thereof were accepted by the said Cassius B. Hanna as a home. Neither is it true that the building of said house by said trustee on said land and the devotion of said house and land to the uses of the said Cassius, as aforesaid, were accepted by said Cassius as a fulfillment and performance of the trust created for his benefit by said last will and testament. Neither is it true that said house and lands have been occupied by said Hanna as a home ever since the time of its construction. Neither is it true that the said Cassius B. Hanna has an equitable life estate in and to said lands and buildings so described in said bill of complaint, or that he has any other character of estate therein, or any right, title or property to said estate, or any interest therein. Neither is it true that said J. Twing Brooks, as executor or trustee, holds said estate or any part thereof in any amount in trust to pay the said Cassius B. Hanna any part thereof. Neither is it
49 true that the said Cassius B. Hanna is entitled to receive from said J. Twing Brooks, as executor or trustee, one-half of the yearly income or increase of the said estate of Robert Hanna, or any part thereof. Neither is it true that the payment of any portion of the income of said estate is a charge upon the estate and assets in the hands and under the control of this defendant for the benefit of the said Cassius.

And this defendant denies that said Cassius B. Hanna or Hattie L. Hanna have any right, title, interest or claim to the estate of said Robert Hanna or any part thereof.

This defendant further answering, says that said Cassius B. Hanna never exercised the option given him in item 7 of his father's will to have a separate home purchased or constructed for his own use, and, on the contrary, the said Cassius B. Hanna declined to make a request for a separate home for himself, and gave as a reason therefor that he could not afford to have deducted from his half of the annual net income of his father's estate six per cent. on the cost thereof, and insurance, taxes and assessments which were by the will required to be deducted from the half interest that would ultimately pass to the heirs of the said Cassius B. Hanna.

This defendant says that the property described in the complainant's bill of complaint, as situated upon Euclid avenue, was owned by Robert Hanna for many years prior to his death, and at the time of his death and ever since has been simply treated as a part of decedent's estate; that for two or three years following Mr. Robert Hanna's death, Cassius, his wife and two children, and the three grandchildren of the deceased daughter, Arrial, continued to occupy

the old Hanna homestead on Prospect street; that during those years the net income of the estate became seriously diminished; at the same time an unusual amount of money was needed each year to keep the said property in proper condition and pay the
50 necessary compensation to servants, and for the large amount of fuel which was needed to make the house comfortable, and other necessary expenses, and on this account only, and for the sake of being able to provide a comfortable home on a largely reduced scale of expenditure for all of the beneficiaries of Mr. Robert Hanna's estate, the executor and trustee built a house on the Euclid-avenue lot described in complainant's petition, and from the time the same was completed to the present time the same has been owned, held and controlled as a part of the Hanna estate and made use of as a home by the grandchildren of Robert Hanna, deceased, and by Cassius Hanna's wife, and a part of the time by Cassius himself.

This defendant avers that Cassius B. Hanna left Cleveland for the West about three years ago, since which time he has had nothing whatever to do with said real estate, nor personally occupied the same.

This defendant said that he has kept said property insured and paid the taxes thereon, and kept up the repairs for the same in all respects as an integral part of the estate of said Robert Hanna, deceased, and has kept no separate account of the same, and that the children of Arrial, the deceased daughter of the said Robert Hanna, named Harriet Whitaker, Mary Whitaker and Robert H. Whitaker, have occupied said estate by permission and sufferance with the wife of the said Cassius B. Hanna and her children, but that the said property so described on Euclid avenue has not been in the possession or under the control, in any respect, of the said Cassius B. Hanna for the three years last past, and that he has no control, neither has he any right of control over the same, and that the title, interest and right of control in said property is solely in this defendant, as executor and trustee of the estate of said Robert Hanna, to be controlled under and by virtue of the provisions of said last will and testament.

This respondent, further answering, says that the said
51 Cassius B. Hanna, from his early boyhood up to maturity and after marriage, and up until the time of the execution of the will hereinbefore set forth, was a spendthrift, and unable to appreciate the value of property, and when furnished money or means by his father, failed to exercise a reasonable discretion in keeping, caring for or expending the same; that prior to the execution of said will, and at the time of such execution, he was insolvent and worthless, and failed to comfortably maintain his wife and children, and that at the time of the execution of said will he was largely indebted, without any reasonable hopes of ever extricating himself from such indebtedness; that at the time of the execution of said will and codicil, he had two children; that the name of his wife, as mentioned in said bill of complaint, was Hattie L. Hanna, and his children were and are Arrial T. Hanna, aged twenty years, and Edith Frances Hanna, aged nine years, who are still living; and

that the said Robert Hanna, at the time of the execution of said will and codicil, then well knew of the indebtedness of the said Cassius B. Hanna, which was contracted in improvident speculations, and all of the aforesaid facts, and that said testator, in preparing said will and codicil, intended that no part of said indebtedness should be paid out of the assets of his estate, and desired that his will be so drawn and executed that the same would not authorize any portion of the assets of his estate, through the agency of said Cassius B. Hanna, to be applied to the satisfaction of said indebtedness; that the said testator had, at the time of the execution of said will, but one child then living, to wit, Cassius B. Hanna, and three grandchildren, the surviving issue of Arrial T. Whitaker, daughter of the said testator; the said grandchildren are Harriet DeLorma Whitaker, aged twenty-three years; Mary E. Whitaker, aged nineteen years, and Robert H. Whitaker, aged seven-
52 teen years, all still surviving; that by the provisions of said will the whole of said estate was devised to this respondent in trust; that as to one-half of the income of said estate, after payment of the expenses and charges enumerated in said will, the same was to be applied or withheld, according to the judgment and discretion of this respondent, who has held title to the same and still holds title thereto, under the provisions of said will, for the benefit of the said Cassius B. Hanna and his family, wholly at the discretion of this respondent, the said testator then and thereby intending to provide against the improvident wasting of any portion of the assets of his said estate by the said Cassius B. Hanna, and also thereby intending to place the assets of his estate beyond the reach of the claims of any creditors of the said Cassius B. Hanna; and the said testator did then and thereby intend, by the provisions of said will and the codicil thereto, to authorize this respondent, if he should deem best, but making the same solely to depend upon his judgment and discretion, to furnish the wife and children of the said Cassius B. Hanna with the reasonable necessaries and comforts of life, and in case, in the judgment and discretion of this respondent, he should deem best, then respondent was authorized by the provisions of said will, upon the final distribution of said estate, to distribute the same wholly among the grandchildren of the testator, in accordance with the provisions of said will.

This respondent says, that prior to the death of said Robert Hanna, he, the said testator, had advanced to the said Cassius B. Hanna, and charged to him as such advancement, the sum of $52,000 in excees of what had been received by his said daughter, Arrial, from him, no part of which advancements were ever paid by the said Cassius B. Hanna. This respondent says that he has never invested a dollar of the income of said estate for the said Cassius, otherwise than to pay the same for the support of the
53 said Cassius and his family, and that the income of the one-half of said estate has been inadequate and insufficient to support said family, who received no maintenance from the said Cassius, and has been wholly insufficient te enable said family to live decently; that in order to enable said family to live comfort-

ably, this respondent, in addition to said income, has used about the sum of $3,000 of the principal of said estate, in providing the ordinary comforts of life for the wife and children of said Cassius.

This respondent says, that whatever gifts or benefits were intended by the terms of said will, to be in any manner applied to the support of said Cassius B. Hanna, were intended to be by the said testator, and were and are subject to the judgment and discretion of this respondent, and that so far as any portion of the net income of said estate or the principal thereof has been by him, acting as such executor, appropriated to the support of Cassius B. Hanna and his said family, the same was by this respondent faithfully and honestly so applied in the exercise of an honest judgment and discretion, and with the honest belief that he was under no legal obligation to pay any portion of the same to the said Cassius B. Hanna, but that respondent had the right, in the exercise of his discretion, to apply the said income and said portion of the principal of the assets of said estate, in order to supply the said Cassius and his wife and children with the necessaries and reasonable comforts of life.

Respondent says, that the said testator did not intend by the terms of said will to give the said Cassius B. Hanna control over any portion of the assets of his estate.

And this defendant, having fully answered, prays to be hence dismissed with his costs.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for J. Twing Brooks, Executor, Etc.

54 UNITED STATES OF AMERICA, }
The State of Pennsylvania, Alleghany County, } *ss:*

J. Twing Brooks, being sworn, says that the facts set forth in his foregoing amended answer and the allegations therein contained are true.

J. TWING BROOKS.

Sworn to before me by the said J. Twing Brooks, and by him subscribed in my presence this third day of August, A. D. 1891.

[SEAL.] DAVID J. KYLE,
Notary Public.

Received copy of the above amended answer this fourth day of August, 1891.

J. WM. BALL,
Solicitor for Complainant.

Which said amended answer had the following endorsement thereon: No. 4743. In the United States circuit court. F. A. Raynolds, plaintiff, *vs.* Cassius B. Hanna *et al.*, defendant. Amended answer of J. Twing Brooks, executor, etc., filed August 4, 1891. Irvin Belford, clerk United States circuit court.

Demurrer to Amended Answer of J. Twing Brooks.

Afterwards, to wit, on September 15, 1891, a demurrer was filed herein, which demurrer reads and is in the words and figures following, to wit:

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA and J. TWING BROOKS, Trustee, Defendants. } Demurrer.

Now comes the complainant and demurs to the amended
55 answer of defendant, J. Twing Brooks, filed herein, for the reason that it does not state facts sufficient to constitute a defense to the action of complaint.

F. J. WING AND
WM. BALL,
Solicitors for Complainants.

Brief.
The brief filed to demurrer to original answer.
The opinion of Judge Brown on demurrer.
The opinion of Judge Jackson on merits.

Endorsed: No. 4743. In United States circuit court. F. A. Raynolds, plaintiff, *vs.* Cassius B. Hanna *et al.* Demurrer to amended answer of defendant J. Twing Brooks. Filed September 15, 1891. Irvin Belford, clerk United States circuit court. F. J. Wing and J. Wm. Ball, solicitors for complainants.

Continuance.

Afterwards, at the April, A. D. 1891, term of this court, to wit, on October 5, 1891, this cause was continued to the next term of this court.

Report of Irvin Belford, Special Master.

Afterwards, to wit, on January 23, 1892, an entry was made and entered herein, which entry reads and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } In Equity. No. 4743.

This day came Irvin Belford, heretofore appointed special master and examiner in this case, and filed herein his report as such master, together with the Exhibits A, B, C and D thereto attached and made a part thereof.

IRVIN BELFORD, *Clerk.*

January 23, 1892.

56 The Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA *et al.*, Defendants. } In Equity. No. 4743.

To the Hon. Howell E. Jackson and the Hon. William H. Taft, judges of the said court:

In pursuance of a decretal order made and entered in this cause, and bearing date on the twenty-ninth day of July, A. D. 1891, at a stated term of this court held at the court-house in the city of Cleveland, in the said district, by which it was referred to Irvin Belford, a special master, to take and report testimony, and report his findings upon the following points:

First. What the estate of Robert Hanna, deceased, consisted of on November 20, 1889, the date complainant's bill was filed.

Second. What has been the net income annually arising therefrom since said date, after paying the taxes and charges as directed by the eighth item of said will, and what is the present net income of said estate.

Third. How, or in what manner said net income has been applied or disposed of by the executor and trustee, and what portion of the one-half thereof has been advanced to or appropriated towards the support of Cassius B. Hanna, or for himself and family, and what portion thereof has been invested for his benefit before and since the twentieth day of November, 1889, and also the date when the youngest child of the testator's daughter, Arrial, will arrive at majority, and such other facts as either side may deem material and important in arriving at the question and quantum of Cassius' interest in the designated trust fund.

57 I, Irvin Belford, special master aforesaid, do respectfully report that I proceeded to investigate the matters so referred to me, and that, pursuant to a summons duly issued, I have been attended by the parties, complainant and defendant, and their respective counsel in the above cause, and that, after taking due proofs, I find and report as follows:

Finding No. 1.

I find that the executor and trustee, J. Twing Brooks, under the powers given him by the last will of Robert Hanna, executed a lease of lands described as follows: Lot eight in section fifteen, township thirteen, range five, in Hocking valley, formerly Athens county, Ohio, and thereby granted to the Columbus & Hocking Coal and Iron Co. the exclusive right, permission and license, to enter upon, mine and remove the coal from said premises. The last-named company, by the terms of said lease, was obliged to pay a rental of $416.66 per month at least, whether any coal is mined or not, and ten cents per ton royalty on all coal mined in excess of 50,000 tons per year. The trustee and lessor reserved the right to forfeit the lease and license to mine at any time when the lessee

failed to pay the stipulated rental when due, whether coal was mined or not. The lease was executed September 9, 1885, and the lessee has been in possession ever since. No mining has been done except by way of pushing entries, and no coal has been taken out. The trustee has received as rental from the lessee $30,000, and the lessee still has the right to take from said mines coal, under said lease, to the value of $30,000 without additional payment therefor. It does not appear from the testimony, whether the mines embraced in this lease were opened during the life of the testator, and it has been maintained, that if these mines were not opened during the lifetime of the decedents, the tenants for life, or *cestui que trust.* were not entitled to the proceeds or use thereof. But the very ample authority conferred upon the trustee empowered him, in
58 his discretion, to sell, lease or improve the real estate, or use it in any (manner) that the testator himself could do, if living. In his discretion he did not sell it, but leased it, and thereby opened new mines; and this power and this act gave the life tenants the same right in the unopened mines that they would have if the mines had been opened and operated in the testator's lifetime. Mr. Brooks, the executor and trustee, says in his testimony that he has never given a dollar of the money received on account of royalties on coal to the heirs, and he is still receiving, as a royalty, the sum of $416.66 per month. He has assumed that the money accruing from the lease is to be considered, not as income, in the sense in which that word is employed by the testator, but as capital to be invested, and only the interest thereof paid to C. B. Hanna, and others entitled to the income. He has, accordingly, reinvested such royalties in notes or in other securities, and applied the interest therefrom as income. Counsel for the executor justifies this course, on the theory that a lease on the exclusive right to mine and sell all the minerals in or under land, without limitation as to quantity or time, is to be taken as a sale of mineral in place, and consequently, a sale of a portion of the land.

In determining the rights of parties, under such a conveyance, the authorities generally, and I think properly, hold that view. But the question in this case is not as to the effect of such a lease as between the parties thereto, but whether the money accruing therefrom, in the disposition thereof by the trustee, shall be considered as income or capital. The word income means the gain which accrues from property, labor or business. In its ordinary and popular meaning, it is strictly applicable to the periodical payments in the nature of rent, which are usually made under coal and other mineral leases.

There does not seem to be any provision of the will,
59 either express or implied, that payments in the nature of rent shall be necessarily reinvested for the ultimate benefit of the grandchildren, and, in the absence of such provision, and — view of the evident purpose on the part of the testator to make the provision for the maintenance of Cassius B. and his family, and the children of Arrial, his daughter, the paramount feature of the will, and the remainder over to the grandchildren of Cassius a secon-

dary object, it would be an unreasonable conclusion to hold that he only intended to give the first objects of his bounty the annual interest on the installments of royalty only. A thorough examination of the authorities leads me to the conclusion that the royalty paid under the coal lease is in the nature of rent, is made a part of the annual profits of the estate, and was and is payable to the *cestui que trusts*, and does not form corpus—that it is to be considered income, and not capital, and this finding I recommend to the court.

Finding No. 2.

I find, that in April, 1882, 170 shares of the capital stock of the Union Steel Screw Company, of Cleveland, Ohio, stood registered in the name of Robert Hanna, deceased, and were a part of the assets of his estate. The par value of this stock was $100 per share.

At the regular annual meeting of the stockholders and directors of said company, held January 18, 1883, a resolution was adopted by the stockholders authorizing the directors to declare a dividend of twenty-five per cent. payable in the stock of the company to stockholders of record January 18, 1883.

In pursuance of such resolution, stock certificates of the par value of $100 per share to the amount of twenty-five per cent. of the stock held by the stockholders of record January, 1883, were issued. Forty-two and one-half shares of such stock were passed to the account of the estate of Robert Hanna, deceased, and de-
60 livered to the executor. The executor treated this dividend as income, but instead of delivering these forty-two and one-half shares to the *cestui que trust*. he paid them on account of income out of the funds in his hands, the par value thereof, to wit, $4,250, and retained the same as an investment and except as to the one-half shares sold in February, 1883, he still holds these shares of stock dividend as invested capital.

It is contended on the part of the complainant that the stock dividends were income, and that such stocks, either in specific or their present market value in money should be turned over and subject to complainant's claim. The defendant, Brooks, as trustee, claims ownership by virtue of the transaction stated, as capital and assets of the estate.

I find that at the time such stock was issued there had been 4,340 shares of original stock theretofore issued under the charter, which provided for a capital stock of $1,000,000; that the vote in favor of said resolution represented 2,265 shares; that these stock dividends were treated by said company as capital and paid out for the surplus earnings then on hand, which had been before that time used in their business, and that it was the purpose of the company to carry over such earnings to the capital account and turn it into capital stock, and that the same were not treated as dividends in the ordinary sense of the word; all of which they may legally do under their certificate of incorporation.

The law in England on this question is well settled, and it is there held that the dividend which a tenant for life is entitled to is

the dividend which the company chooses to declare, and when the company meet and say they will not declare a dividend, but will carry over a portion of the earnings of the capital stock and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain, and this rule obtains whether the profits are of the current year or have been previously reserved for the purposes of its business.

61 The rule in the United States is not well settled, but the weight of the authorities *are* in favor of the English practice; the majority of the courts being of the opinion, that where dividends create new capital in addition to that already existing, thereby enlarging the corporate property and increasing its value, stock dividends belong to the remainder man, whether they arise from earnings or from other sources.

As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profits. In one State (Massachusetts) a simple rule has been adopted: that is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital. In other States the particular circumstances of each case determined upon principles of equity governs, and the thing distributed, whether stocks or money, is awarded to whomsoever is entitled to profits.

In this case the surplus converted into capital stock has been accumulating for a number of years. At the death of Robert Hanna these accumulations were as much a part of his capital as any other part of his estate. Upon principles of equity it should be regarded as a part of the capital from which subsequent income is to arise, and it has been used by the executor in this way. This surplus was so essentially a part of the stock itself held by decedent that it would have passed by a sale of the stock alone.

In the light of all the authorities, I am led to conclude that these forty-two and one-half shares of stock dividend were capital and not income; that they were when issued assets of the estate and subject to the trusts contained in the will, and that the *cestui*

62 *que trust.* were and are entitled only to the income arising from such investment, and I find accordingly. And I further find that the trustee is entitled to credit in the sum of $4,250, paid on account of such stocks as advanced income.

Finding No. 3.

I find, that acting under the advice of the probate court, and believing it to be in accordance with the intent of the testator, though not strictly in pursuance of the directions of the will, nor at the instance or request of C. B. Hanna, the executor, out of the funds in his hands, built a house on lots Nos. 1753–'5 Euclid avenue, for the joint occupancy of the family of Cassius B. and the minor

children of the deceased daughter, Arrial, at a cost of $10,500, and upon its completion it was jointly occoupied by Cassius' family, and such minor children of the deceased daughter, Arrial, and continues to be so occupied so, free of rent. No part of the income was used in the construction of the house. The children of the testator's daughter, Arrial, were boarded in Cassius' family, at the price of $5.00 a week for each, which price was paid to Cassius, or his wife, by the trustee out of the share of the income due to said minor children. The house has a rental value of $1,000 per year. I do not find that Cassius has an equitable estate in the house, and do not assume to pass upon that question.

Finding No. 4.

I find that the following is a list of all the assets of the estate of Robert Hanna, deceased, which ever came into the possession of the executor, such list showing in the extreme right-hand column all cash received on account of such assets:

63	Nominal value or par value.	Am't actually received.
Union Steel Screw Co. stock	$17,000 00	$17,000 00
Ohio National bank	23,100 00	23,100 00
Lake Shore & Tus. Valley R. R. Co.	1,000 00	
Chippewa Mining Co.	53,750 00	
Sun Fire Insurance Co.	100 00	
West Hickory Oil & Mining Co.	32,750 00	786 00
Hickory Farm Oil Co.	16,435 00	394 44
C. G. Hussey Pacific Gold and Quartz Mining Co.		
Resolute Fire Insurance Co.	10 00	
Lorillard Fire Insurance Co.	20 00	
H. O. King Pittsburgh Fire Steel Mining Co.		
W. Bisson Fire Steel Mining Co.		
Detroit, Mich. North American Mining Co.		
Leonard Hanna and H. Garretson, joint owners		
Ohio Mining Co. one-third interest		
Erie Mining Co.	25,000 00	
Hanna, Garretson & Co., one-third interest	35,000 00	
Continental Improvement Co.	750 00	2,950 00
Cleveland & Sierra Hydraulic Mining Co.	25,000 00	
Hand Gold Mining Co.	15,500 00	
Standard Oil Paint Co.		267 34
Ohio Trap Rock Mining Co.		
Note of Fred. K. Leach, Jr.	3,000 00	800 00
W. H. Collins, note	30 00	
H. C. Brainard	261 31	
A. B. McNairy & G. H. Hessin	10,000 00	10,000 00
F. Leach, draft on R. H.		
Cherry Valley Iron Co. note	1,480 86	1,000 00
Notes of Charles H. Tucles	1,100 00	
Tryphena Nichols	50 00	
R. A. Hapgood	25 00	
Int. in old assets of Ohio National bank	4,036 65	922 65
Cherry Valley Iron Co. bonds	4,800 00	
" " " " notes	240 40	
Letonia Iron & Coal Co. note	5,000 00	1,907 76
C. B. Hanna note	200 00	
" " "	300 00	
" " "	5,000 00	
Note C. B. & H. L. Hanna, secretary by mortgage	16,900 00	
C. C. Davidson, draft on C. B. H., paid by R. H.	1,000 00	
" " " " "	1,000 00	

C. B. Hanna, promissory note, order of Stebbins, Post & Co	8,100 00	
C. B. and H. L. Hanna, promissory note	9,000 00	
Interest in Citizens' Saving & Loan Association	6 33	6 45
Osage Mining Co.	25,000 00	
Homestead property, 328 Prospect street		
Euclid Avenue property, 1753-55		200 00
Hocking county lands		30,000 00
Illinois lands		880 55
Missouri land, 320 acres		
120 acres in Michigan		
Estate of Harriet Hanna, deceased		35 12
Family carriage		75 00
Interest in Hessin partnership, in Tennessee lands		75 00

In July the executor exchanged the Prospect-street property with Edwin Cowles, for his property corner of Superior and Erie streets (sixty-four feet on Superior, with $22,500 additional) of which amount he paid Cowles in cash, $2,500, and assumed his mortgage of $20,000, to Mr. Rawson, of Newton, Mass., which was due April 11, 1891, and paid at that time.

Finding No. 5.

64 I find that the assets of the estate of Robert Hanna, deceased, in charge of J. T. Brooks, executor and trustee, on the first day of November, 1891, is embraced in the following list, the value thereof, according to the estimation of such trustee, being indicated:

	Estimated.
Property corner Superior and Erie streets, Cleveland	$75,000 00
Homestead property, 1753-55 Euclid avenue, estimated value	25,000 00
160 acres land in Hocking county, Ohio, estimated value	30,000 00
320 acres land in Morgan county, Missouri, estimated value	1,600 00
132½ acres land in Houghton county, Michigan, estimated value	650 00
160 acres in Marquette county, Michigan	800 00
212 shares stock in Union Steel Screw Co., par	21,200 00
200 shares stock in Chartiers R'y Co., par	10,000 00
Note of J. J. Brooks, secured by collateral	7,023 54
" J. McDonald and others, joint and several	1,250 00
" Episcopal church, Dayton, Ohio	1,000 00
" Miss Hattie Whitaker	1,000 00
" Annie C. and Howard Blair, secured by mortgage	1,560 00
" U. R. Sigler	3,316 00
" C. B. and H. L. Hanna	1,950 00
Stock of Sun Fire Insurance Co., par $100, worthless	
Chippewa Mining Co., stock, par, $53,750, worthless	
Lake Shore & Tuscarawas Valley stock, par $100	Worthless.
Resolute Fire Insurance Co., par $10	"
Lorillard Fire Insurance Co., par $20	"
Fire Steel Mining Co., North American Mining Co., Ohio Mining Co., Erie Mining Co. — Owned jointly by Hanna estate in connection with Hanna, Carrison & Co., par value, $60,000	Worthless.
Cleveland & Sierra Hydraulic Mining Co., par $25,000	Worthless.
Osage Mining Co., stock, 828,435, on which $6.65 per share only have been paid. Estimated value, $1,000.00	
Hand & Barlow United Gold Mines and Hydraulic Works of Georgia, par $7,750. Estimated value, $1,500.00	
(This stock received in exchange for $15,500 par in Hand Gold Mining Co. in 1890, value of which stock is supposed to be the same)	

Ohio Trap Rock Mining Co. certificates never found	Worthless.
Note of W. H. Collins, $30	"
Note of H. C. Brainard, $261.31	"
Note of F. Leach, sight draft on R. Hanna, $150	"
Note of Charles H. Tucker, $1,000; note cancelled: not paid	
Note of R. A. Hapgood, $25	Worthless.
Interest in old assets, Ohio National bank	Believed worthless.
Cherry Valley Iron Co.; bonds, $4,800	Worthless.
Cherry Valley Iron Co.; notes, $240.40	"

Finding No. 6.

And now, as specially directed by the decretal order herein, I find that the estate of Robert Hanna, deceased, in charge of J. T. Brooks, executor and trustee, on the twentieth day of November, 1889, as nearly as can be ascertained by the proofs at hand, consisted of the following property (the trustee's estimated value of the same being indicated in figures):

Lot corner of Superior and Erie streets, Cleveland, 63 x 166 feet, estimated value	$75,000 00
1753–5 Euclid avenue, 107 x 350 feet, estimated value	25,000 00
160 acres Hocking county, Ohio, estimated value	30,000 00
320 acres Morgan county, Missouri, estimated value	1,600 00
132½ acres Houghton county, Michigan, estimated value	650 00
160 acres Marquette county, Michigan, estimated value	800 00
40 acres Whiteside county, Ill. (since sold), estimated value	400 00
Union Steel Screw Co., 212 shares, $100 each, par value	21,200 00
Pittsburgh, Wheeling & Kentucky R. R. Co., 228 shares, $50 each, cost (since sold)	11,000 00
Note of Charles T. Brooks (since paid)	1,045 00
65 Note of J. J. Brooks (since paid)	1,671 00
Note of W. C. Boyle (since paid)	3,100 00
Note of Ideal Plow Co. (since paid)	500 00
Note of John E. Davidson (since paid)	1,200 00
Note of J. J. Brooks, secured by collaterals and interest paid to last semi-annual period	7,023 54
On deposit with Farmers' National Bank of Salem till investment could be found (since invested)	5,000 00
Note of R. V. Hampson (since paid)	3,000 00
Notes of Cassius and Hattie Hanna and of Hattie alone, she wife of Cassius	1,950 00

Sun Fire Insurance Co., 5 shares, $20 each, worthless.
Chippewa Mining Co. stock, par value, $53,750, worthless.
Lake Shore & Tuscarawas Valley Co., par value, $1,000.00, worthless.
Resolute Fire Insurance Co., par $10, worthless.
Lorillard Fire Insurance Co., par $20, "
Fire Steel Mining Co.
North American Mining Co. } Owned jointly by Hanna estate, and Hanna, Carrison & Son. Total par value, $60,000, worthless.
Ohio Mining Co.
Erie Mining Co.
Cleveland & Sierra Hydraulic Mining Co. Par $25,000, worthless.
Hand Gold Mining Co. Par $15,000, value unknown.
Ohio Trap Rock Mining Co. Worthless; certificate never found.
Note of W. H. Collins, $30, worthless.
" H. C. Brainard, $261.31, worthless.
F. Leach, draft on R. Hanna, $150.00, worthless.
Note of Charles H. Tucker, debt cancelled but not paid.
R. A. Hapgood, note $25, worthless.
Interest in old assets Ohio National bank, believed worthless.
Cherry Valley Iron Co. Bonds, $4,800, worthless.
" " " Notes, $240.40, "
Osage Mining Co. Shares, par value, $25,000, believed worthless. (May be worth $1,000.)
Balance on deposit with State National bank about $50.

Finding No. 7.

I find that the net income annually arising from said estate from November 20, 1889, after paying taxes and other charges as directed, by the eighth item of said will, up to September 1, 1889, including royalties received from coal property, is as follows:

From Nov. 20, 1889, to Dec. 31, 1889	$1,527 33
From Jan. 1, 1890, to Dec. 31, 1890	13,561 08
From Jan 1, 1891, to Sept. 1, 1891	7,512 61
A total of	$22,601 02

Such income for the periods named was made up as follows:

1889. Royalty..	$555 54,	other sources,	$971 79	$1,527 33
1890. " ..	5,000 00,	"	8,561 08	13,561 08
1891. " ..	3,333 33,	"	4,179 28	7,512 61
Totals...	$8,888 87,		$13,712 15	$22,601 02
One-half portion net income				$11,300 51

Finding No. 8.

I find that since November 20, 1889, up to September 1, 1891, of the one-half of said net income, including said royalty, there has been advanced to, or appropriated towards

The support of said Cassius B., or for himself and family, the sum of	$2,988 00
And that there has been retained and invested for said Cassius B. Hanna by the trustee, the sum of	8,312 51

66 *Finding No. 9.*

I find that the present annual net income of said estate, including said annual royalty, as nearly as the

Same can be estimated, is $11,800 00

Finding No. 10.

I find that the net income prior to November 20, 1889, has been applied and disbursed by the executor by paying a part thereof to the beneficiaries named in the will, and by investing the remainder for their benefit.

I find from the evidence, that prior to November 20, 1889, the income account of said estate set apart by said executor for C. B. Hanna and family, not including royalties from the coal lease,

Amount to the sum of	$14,062 93
And that at the same time, the one-half of royalties received, amount to	100,486 64 (?)
Making the one-half of total income, including royalty	24,549 57

Of this one-half of said net income, there has been advanced to or appropriated towards the support of said Cassius B. for himself and family, up to the twentieth day of November, 1889,

The sum of..... $20,262 93

Made up of the following items:

Overdrawn income shown by books	$847 85
Overdrawn income evidenced by notes and bills.....	1,102 15
Amount paid for stock dividends of screw Co.....	4,250 00
Accrued income other than royalty, paid.....	14,062 93
	$20,262 93

And there has been retained of this one-half of the net income, and prior to November 20, 1889, invested by the executor the remainder,

The sum of..... $4,286 64

Finding No. 11.

I find that there is also an amount due to the trustee from the late Ohio National bank of undivided assets of said bank, and corporation property, consisting of real estate and other property, estimated by the bank officials at a value of from ten to fifteen per cent. of the stock formerly owned by Robert Hanna, de-
67 ceased—in other words from $2,310.00 to $3,465.00—and that the same, if ever paid, will constitute capital in the hands of the executor, and not income, to be paid to the beneficiaries having a life estate.

Finding No. 12.

I find that Robert Hanna, the youngest child of the testator's daughter Arrial, will arrive at majority September 17, 1894.

While in the opinion of the master, the question of increase or decrease of values of personal or real property is entirely irrelevant, yet, because of requests made by counsel, I do find as follows:

Finding No. 13.

I find the increase of personal property of said estate collected and received by the trustee, which has been retained and invested by him, amounts to $—.

One-half of which is the interest of C. B. Hanna therein.

Finding No. 14.

I find that the increase in the value of the real estate at the corner of Erie and Superior streets, since November 20, 1889, has been $10,000, which Mr. Brooks testified he traded for as an investment in real estate.

Finding No. 15.

I find that the increase in value of the 212 shares of the Union Steel Screw Co. stock, a part of the assets of said estate, has been $10,600, since the same came into the hands of the trustee.

Finding No. 16.

In conformity to requests presented by counsel for defendant, J. Twing Brooks, I find that Cassius B. Hanna has not at any time lived with his family, or personally occupied the house built by said trustee on the Euclid-avenue lot, described in complain-
68 ant's petition, within three years last past. But I do not find that there has been a legal separation, or a separation in fact, of Cassius B. Hanna and his wife Hattie L.

Finding No. 18.

I find that Cassius B. Hanna at the time of the execution of the will set forth and described in the amended answer of the respondent, was hopelessly insolvent and worthless financially, and that such insolvency was then known to the said Robert Hanna, deceased.

Finding No. 19.

I find that the amount of indebtedness due from said Cassius B. Hanna to said Robert Hanna, at the time of the decease of Robert Hanna, and before that time, charged to the said Cassius B. Hanna, as an advancement in excess of what had been received by Arrial, daughter of the said Robert Hanna, deceased, amount to something over $52,000.00 and about that sum; but I do not find as a matter of fact, or as a legal conclusion, that said amount, or the several sums composing it, constituted an advancement to said Cassius B. Hanna.

Finding No. 20.

I find that in addition to the $10,500 expended in the construction of the house at 1753–5 Euclid avenue, which constitutes the home of Cassius' family, free of all expense in connection with the care and repair thereof, that the executor has at various times advanced out of the assets of the estate various sums, at one time aggregating over $3,000, to provide the ordinary comforts of life for the wife of the said Cassius B. Hanna. The books of account of said trustee show that on November 20, 1889, the time when the complainant's bill herein was filed, the income account due to Cassius and his family was overdrawn $847.85, the royalty not being considered as income by the trustee; that at the time
69 Mr. Brooks' testimony was given he held notes and other evidences of indebtedness against the family, on account of advanced income not embraced in the accounts heretofore spoken of, for the sum of $1,102.15, making the total amount of such advanced income $1,950.

It also appears from his testimony, to relieve some pressing necessity of Cassius, he gave him $900, realized as a consideration for the release of a claim of the estate against the Colorado stamp-mills, and that amount was not charged up as income.

Finding No 21.

I find that the claim gift to C. B. Hanna and his family was deemed by said executor and trustee to be subject to the discretion of the executor, and that he, as such executor, has heretofore, at all times, exercised an honest discretion in the construction of the will and the distribution of the assets and the increase of the estate in controversy, and has faithfully endeavored to honestly exercise this discretionary power as he believed he was entitled to.

I respectfully refer to exhibits hereto annexed: Exhibit A being the testimony taken upon this examination; B, the copy of lease of coal lands; C, the request to find presented by the counsel for complainant, and D, the request to find presented by counsel for defendant, J. Twing Brooks, respectively, as making a part of this my report.

Witnesses appeared and examinations were held in the presence of counsel for complainants and defendants on the days and parts of days following: September 22, 28, 29, October 7, 9, 13, 14, November 12, 14, 19, 21, 1891, January 22, 1892.

It has been agreed by and between the parties that the services of J. G. Pomerene, the stenographer, in the taking of proof and memorandum from the master, together with copies thereof to be furnished to the parties respectively, shall be taxed up, reported by the master and made a part of the costs incident to this reference.

All of which is respectfully submitted.

IRVIN BELFORD, *Master.*

Dated January 23, 1892.

70 *Testimony Taken Before the Master.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee, Defendants.
} Hearing Before Master.

Testimony taken before Irvin Belford, special master, under an order of court made in the above-entitled case, in a hearing at the clerk's office, in the city of Cleveland, on Tuesday, the twenty-second of September, 1891.

Present on behalf of complainant, J. William Ball.
On behalf of defendant, Moses R. Dickey.

It is agreed between the parties that the fees for the services of the stenographer in this hearing shall be taxed up as part of the costs in this case.

Testimony of J. Twing Brooks.

J. TWING BROOKS, a witness produced in response to a subpœna on behalf of complainants, being sworn, testified as follows:

By Mr. BALL:

Q. State your name, age, place of residence and occupation.

A. J. Twing Brooks; about fifty-one years old; Salem, Ohio; farmer.

Q. What did the estate of Robert Hanna, deceased, in November, 1889, consist of?

A It is difficult for me to tell exactly what the estate was at the period named. I took charge of the estate under a last will and testament which required me to protect and preserve the
71 principal and divide the net income annually. The principal of the estate has therefore been substantially the same from the time I took it in April, 1882, during all the intervening period to the present day. When the estate came into my hands it consisted of lands situated in Ohio, Michigan, Missouri and Illinois; also stocks in mining and manufacturing companies, bank stocks, notes, due bills and a small amount of chattel property at the homestead. A large proportion of the nominal assets of the estate are in my hands today, exactly as I received them in 1882, nothing having ever been realized from them as principal nor as income. Under the will no inventory and appraisement of the property was intended to be made, but, for my protection, shortly after Mr. Hanna's death I called three gentlemen, resident citizens of Cleveland, to act as appraisers and to make an inventory of the estate. That inventory is in my possession and I will furnish and make an exhibit and attach to my testimony, if desired, a statement of every item of property that I found belonging to the estate of Mr. Hanna, and everything that I have received as principal from each item from that time to this.

Referring to the statement that the principal of the estate is substantially now the same as it was in November, 1889, and at the time it came into my possession, I will say that the present assets of the estate, exclusive of real estate and of entirely unproductive stocks amounting to about $90,000, and they amounted to substantially that sum in November, 1889, I must modify this statement to this extent: that of the $90,000 mentioned $22,500 appears as the result of a cash payment I made in a trade with Edwin Cowles, in 1889, in pursuance of which I exchanged Mr. Hanna's homestead property at 328 Prospect street, Cleveland, for Edwin Cowles' homestead property on the corner of Erie and Superior streets, Cleveland, and paid a difference of $22,500. It is to be further modified by the statement that from the $90,000 are to be substracted
72 about, in round numbers, $10,500, amount expended in improving the lot- known as 1752 and 1755, Euclid avenue, where the heirs of Mr. Hanna have resided since 1885. The exhibit, which I will furnish, will disclose every present item of the estate

whether of value or without value, and, in respect to stocks, the par value thereof, either the par or what I have received from each particular item, and continued as principal of the estate.

Q. Have you that exhibit made out, Mr. Brooks?

A. It is not prepared in such shape as I wish to have it filed, but I can give you any item in regard to it, and that you wish to inquire about.

Q. When can you furnish that exhibit?

A. Before tonight; within two hours.

Q. You, of course, have kept books as executor of this estate, in which will be found the inventory and net income, and all expenditures and transactions in relation to said estate, have you not?

A. I have.

Q. Have you those books here?

A. They are all here.

Q. Will this exhibit you speak of be a transcript of these books, or will it be something else?

A. The inventory has never been copied into the books. I will add, that I have never made a single entry in these books relating to the Hanna estate. Two book-keepers have at different periods performed this work for me, one of whom is now present, the other is temporarily in Dakota on a summer vacation. But the transcript or statement which I shall give you will be my statement under oath, covering every item of property which I have ever known of in connection with the Hanna estate, and will show all that I have ever received from each item. I also have statements, very voluminous, which show income and expenses year by year, and particularly from the twentieth of November, 1889, to the present date.

73 Q. You speak of some real estate in Missouri; will that exhibit show the real estate as well as the personal property?

A. Certainly, every item.

Q. And its valuation?

A. I am not able to give the valuation. I can tell you the taxes we pay on it. I have tried to sell it ever since I have had charge of the estate and have been unable to do so.

Q. I understand you to say there is property in Illinois, Missouri, Michigan and Ohio—those four States?

A. The property in Missouri consists of 320 acres in Morgan county, which was owned by Mr. Hanna for many years before his death. The annual taxes on the entire tract, including the attorneys' fees, are about nine dollars. I have made continual and persistent efforts by correspondence and through the attorneys to find a purchaser, but have been unable to do so. The land in Illinois consisted of about one hundred and sixty acres of what was known as peat or bog lands. They were bought for the purpose of developing the manufacture of peat. This enterprise wholly failed and was abandoned before Mr. Hanna's death, and I have since sold all the lands and buildings and machinery, and realized therefrom in all the sum of $880.55. This comprises all the lands he ever had

in Illinois. The lands in Michigan consisted of about one hundred and forty to one hundred and eighty acres, the annual tax on all of which is about eight dollars, including attorneys' fees. I have tried several times to sell this land and never could get an offer exceeding five dollars per acre, and have thought best to retain it. The lands in Ohio owned by Mr. Hanna at the time of his death consisted of the homestead property known as 328 Prospect street; also lots numbers 1753–75 on Euclid avenue; also about one hundred and fifty or one hundred and sixty acres in Hocking county, Ohio.

74 Q. Has there ever been any appraisal of the real estate?

A. Never. I have already said that the homestead property on Prospect street was exchanged for the Cowles property, on the corner of Superior and Erie, in 1888, I paying a difference of $22,500.

Q. What has been the net income annually, arising therefrom, since said date of November 20, 1889, after paying taxes and other charges as contracted by the eighth item of said will, and what is the present net income of the estate?

A. The net income of the estate divisible among the heirs, from the twentieth of November to the thirty-first of December, 1889, was $971.79. The total gross income for the year ending December 31, 1890, was $11,038.95. The total expenses were $2,477.87. The balance divisible among the heirs was $8,561.08. I have calculated the gross income and expenses, and net income from January 1, 1891, to September 1st, finding that a convenient period to close the date with reference to this investigation. That shows the gross income to September 1, 1891, to be $6,021.28; the gross expenses, $1,842; the balance divisible among the heirs, $4,179.28.

Q. What is the present income of said estate?

A. I have given it for the period beginning November 20, 1889, to September 1, 1891, and that is about as near as I can give it.

Q. Of what does the present income consist, the sources it is derived from, and the amount?

A. The present assets of the estate, which I regard productive, consist of the following:

First. Stocks and notes, amounting to about $47,000, made up as follows: Stock in the Union Steel Screw Company, in Cleveland, $21,200. Stock in the Chartiers Railroad Company, $10,000; the balance consists of notes of different parties, maturing at dif-

75 ferent times; all secured, and all bearing interest at six per cent. The details can be given, if desired.

Second. The Cowles property, on the corner of Superior and Erie streets, in Cleveland, yields about $1,200 a year rents. I was about to add a third, but all receipts from that quarter are treated as principal. They consist of royalties from coal lands in Hocking county, Ohio, the surface of the land being wholly without value, the value of the tract consisting entirely in the minerals on which are received under the lease to the Columbus & Hocking Coal and Iron Company, $5,000 a year. When the coal is exhausted the

land is without value; therefore, the receipts from this quarter from the date of the lease, from August, 1885, have been treated as principal, and added to the principal of the estate.

Q. At what value was the Hocking Valley land put in in the original inventory of the estate?

A. It wasn't valued. No valuation whatever was put on any of Mr. Hanna's real estate at the time of his death.

Q. It was then considered of no value at that time, was it?

A. No, sir; it was considered of considerable value, but actual value not known.

Q. Wasn't it appraised?

A. Not appraised—none of the real estate.

Q. What I want to get at is, whether or not the amount of the inventory was increased by that or not?

A. It wasn't. The appraisers, to whom I have referred, did nothing but appraise the personal property. The real estate stood as Mr. Hanna left it, and is just as it was, except the exchange of the Prospect-street property for the Superior and Erie street property, the Illinois land sold, the receipts of the Hocking Valley coal mines, as stated; the receipts from the coal mines being treated as principal are, when received, immediately invested and the
76 amounts that have already been received go to make up the productive principal to which I have already referred. I have already received $30,000 from the coal mines in Hocking county, all of which forms a part of the $90,000, which I have already referred to in my deposition, and that $30,000 being invested in stocks and notes from time to time, becomes productive the same as any other of the principal assets of the estate which are productive.

By the MASTER:

Q. Not any of it had been distributed?

A. Never a dollar. The moment the coal is out, the land is good for nothing. I have never given a dollar of the money received on account of royalties to the heirs. I never thought that I had a right to.

Q. When was this lease for royalty made?

A. In August, 1885.

Q. How long is (it) to continue?

A. Until every ton of coal that can be mined from the land is taken from it.

Q. Then there is no definite time; it is so much a ton, royalty?

A. The contract requires them to mine at least 50,000 tons of coal a year at ten cents a ton, which amounts to $5,000, and that amount must be paid whether it is mined or not. Up to the first of September I had received from this quarter $30,000, and substantially no work has been done in the mines, except entry work.

Q. Then the larger portion of (or) greater body of the coal is still there?

A. Yes; but the $30,000 already received is to apply as royalties

on coal when it shall be mined, so that to all intents and purposes they have got 300,000 tons of coal out of it already.

77 By Judge DICKEY:

Q. That is, they have got that paid for?
A. They have got that paid for.

By Mr. BALL:

Q. Have you got that lease or contract of royalty?
A. I have not got it with me; it is in Pittsburg.
Q. Will you furnish a copy of it?
A. I will.
Q. The income from that coal mine is an increase of the estate, is it not?
A. It increases the principal of the estate to the extent of $5,000 a year.
Q. And will do so until the coal is all taken out?
A. If the company continues to be solvent. The company has already passed through a severe financial crisis, and I can only say it is a good thing while it lasts, and I hope it will continue to last.
Q. Who are the principal stockholders or owners of that?
A. I don't know. The lessee is called the Columbus & Hocking Coal and Iron Company, having its principal office in Columbus, Ohio. Under the lease they are required to remit to me $416.66 on or before the fifteenth or twentieth of each month, whether they mine any coal or not, with the absolute right of forfeiture if they fail to remit, whether they mine any coal or not; and they are also required to furnish me, as often as I demand, maps signed by their engineer, and their auditor, showing exactly the location in the mine, and number of tons mined per month with each voucher which they send; but as they have never mined, except by way of pushing entries, I have never exacted that condition of them.
Q. Was there not some Ohio National bank stock?
A. Yes, sir.

78 Q. Will you please state what there was of that and what became of it, the dividends derived from it and also any addition or surplus by reason of the reduction of their capital stock?

A. It was a left-hand surplus. Mr. Hanna owned $23,100 of stock in the Ohio National bank at the time of his death. The original capital of the bank had shrunk thirty-three per cent. by reason of bad assets, so that his estate owned $23,100 of stock, and in addition, a certificate signed by certain trustees of the Ohio National bank, indicating that Mr. Hanna's estate had an interest in the old assets of the bank. The appraisers estimated the balance of his interest to be worth $1,100. On that, since Mr. Hanna's death, I have received $922.65. Then of the $23,100 stock in the Ohio National bank, the total amount was paid at par thereof about the year 1888, at which time the charter of the Ohio National bank expired, and the State National bank was incorporated to take its place. The stockholders in the old bank simply received the amount of their stock at par. Some of the stockholders were

allowed to become stockholders in the State National bank, but the Hanna estate was not permitted to become a stockholder, so I received the $23,100 and invested it immediately in stocks and notes for the estate.

Q. How and in what manner, has said net income been applied or disposed of by the executor and trustee, and what portion of the one-half thereof has been advanced to or appropriated towards the support of the said Cassius B., or for himself and family, and what portion thereof has been invested for his benefit, before and since the twentieth of November, 1889.

A. According to the terms of the will, the net income has been first divided into two equal parts, one-half of which has been expended by me for the benefit of Cassius and his family, or
79 given by me directly to Cassius and his family. The other half has been divided into three equal parts, and expended by me for the benefit of the three heirs of Mr. Hanna's deceased daughter, Mrs. Whitaker, or as those heirs have become of age, I have been in the habit of giving them their share of the income at the time as above stated, so that the figures given in the prior part of my deposition which shows the net income of the estate, from November 20, 1889, to September 1, 1891, afford, the basis of calculation, showing exactly how this net income has been distributed between Cassius and his family, on the one hand, and the heirs of the deceased daughter on the other, and in no instance has that rule been departed from, except, that possibly during that period, as has been the case since the estate came into my hand, in order to meet pressing necessities of the family of Cassius Hanna, and especially during the year when the income of the estate was largely reduced in consequence of the non-productive character of some of his investments. I have taken the responsibility of advancing money to Cassius and his family, also to one of the heirs of the deceased daughter, who was about coming of age and being educated, and in my judgment, it became necessary and wise, and proper for me to pay bills incident to her education, notwithstanding the fact that at the time such payments were made the income account of the estate didn't show she was entitled to it. In addition to this, and in order to still further protect Cassius' family and himself from disrepute and ignominy and disgrace, I have loaned them money in small sums from fifty dollars at a time, to as high as $500 at a time, the aggregate I think never exceeding $1,950, to enable them to pay certain household bills which, had they not been paid, would have subjected the family to the disgrace of having their furniture and personal property taken from their home and sold.

I think that my advances to Cassius and his family on the
80 account stated, first, by way of advanced income, second, by way of money advanced for which notes were taken and are now held by me, never have amounted to more than thirty-two or thirty-three hundred dollars, of which I think I now hold about $1,950. The notes signed by Cassius and his wife, and the income account of Cassius and his family will show to what extent they are at this time overdrawn on income account. I have never invested

one dollar of the share of income due to Cassius and his family for him; on the contrary, his income account has always been overdrawn, and I repeat what I have already said, to save him and his family from disgrace and himself from arrest, I have loaned him as high as from $1,500 to $1,800, and now hold their notes therefore, and those notes constitute a part of the so-called productive assets of the estate.

Q. In this income you don't include the rental or royalty from the coal mine?

A. I treat that as principal.

Q. In reference to the Union Steel Screw Company stock, I want to ask you what the income has been from that since the death of Mr. Hanna?

A. The income from the screw company stock has varied from year to year since Mr. Hanna's death, during some years as low as eight per cent., possibly in one year only six per cent., at other times rise as high as twenty-eight per cent. The present income from that source is about twelve per cent. per annum, as near as I can calculate—twelve, fourteen or fifteen per cent.

Q. It has never been lower than six or eight and has been as high as twenty-eight.

A. Yes, sir.

Q. What was the amount of that stock at the death of Mr. Hanna?

A. At the time of the death of Mr. Hanna it was $17,000.

81 Q. What is the present amount of the stock held by the estate?

A. $21,200.

Q. Is that increased stock dividends that have been paid?

A. Yes, sir; that amount was treated as income for the year in which it was received, but, being so valuable in its character, I credited the income account with the par value of the stock, and retained the stock as part of the assets of the estate, dividing the $4,250 as income. This occurred about the year 1884 or 1885.

Q. Will the exhibit which you propose to attach to your deposition show the net income of this stock each year, both money and stock dividends?

A. The statement which I propose to annex to my deposition has reference solely to the assets of the estate. I can, if you wish, furnish you the separate items of income and expenditure from the twentieth of November, 1889, to September 1, 1891, that being the period of inquiry covered by this order.

Q. How did you treat this stock dividend in the screw company—as increase or income?

A. I have said that I treated the stock dividends as income at the time it was received and divided it, as of the year during which it was received.

By Judge DICKEY:

Q. That is, divided it in money?

A. I divided it in money and kept the stock because it was valuable.

By Mr. BALL:

Q. Has there been a cash dividend from six to eight per cent. and as high as twenty-eight per cent.?

A. I incline to think that the $4,250 stock dividend from
82 the screw company was counted as cash income for the year in which we received the twenty-eight per cent. from the screw company. I am quite sure the income from that source has never been as great in any but one year.

Q. What portion of the said net income has been invested for the benefit of Cassius and his family before and since the twentieth of November, 1889?

A. My answer is, I have never invested a dollar of income for him; on the contrary, to preserve a shelter and home for his family and to keep him out of jail I have had to advance him income before it was earned and lend him money.

Q. In speaking of the income, and of not investing any for the benefit of Cassius, you don't include the royalty from the Hocking Valley coal mines?

A. I do not. I have never treated that as income.

Q. Please state what has been the disposition of the royalty, what it has been invested in, if your exhibit will show that?

A. I have administered the estate somewhat as I would administer the affairs of a bank. As fast as money was received I have sought an investment for it, no matter from what source it was received. If I saw a good investment and had not money in hand to purchase or make it, I would borrow a part or all that was necessary, in order to secure it and repay it out of the funds subsequently received. In this manner royalties received from the coal lands in question have been placed to my credit in bank, along with other receipts on account of the estate and the money that is in hand has been invested as rapidly as I could invest it in order to keep the income at as high a point as possible; therefore, it is impossible for me to tell what I purchased or how I invested the specific money received as royalties on the coal. I have loaned money from time
to time on notes. Those notes have been paid, and other
83 notes, greater or less amounts, have been discounted, they in turn paid and others taken, following their predecessors; I have bought stocks and sold them; I have never lost one dollar of income or principal since the estate came into my hands, but have aimed to keep every dollar invested every moment that was possible in order to be able to divide among the children as much income as possible.

By the MASTER:

Q. Will the exhibit you propose to file show what the estate of Robert Hanna, deceased, consisted of at the time you took charge of its affairs, and also what it consisted of November 20, 1889?

A. The exhibit I propose to offer will show every item of real and personal property belonging to the Hanna estate at the time I took it or which has been discovered. It will also show what

amount was realized in cash from each item so found or discovered, also the items of the estate which were in Mr. Hanna's possession at the time of his death, and from which I have never received a dollar. In consequence of my manner of investments it is impossible for me to tell what the estate consisted of at any particular date. All I know is that the principal of the estate has been at a certain figure all the time except as it has been increased by the royalties received from the coal and the conversion of dead assets like the Illinois lands into money and thence into stocks and bonds.

Q. Well, you could make it show what it consisted of at three periods; first, at the time you took charge——

A. That is right; I can do that.

Q. Second, on the twentieth day of November, 1889?

A. That I can't do; I can show what it is now, but really, to go back to any particular intervening period and say what it consisted of—that I can't do.

By Mr. BALL:

84 Q. State whether your books will show, on the twentieth of November, 1889, of what the estate consisted, the moneys received and the purchases made up to that time.

A. My books do show every dollar I have received as income or principal from 1882 to the present date. They also show and are supported by vouchers every dollar I have expended on account of the estate, whether in the making of an investment, the distribution of income or the payment of expenses, such as taxes, repairs, salary of executor, etc., etc. But it will be difficult in consequence of the manner in which I have transacted the business of the estate, making investments from time to time, buying stocks and selling them, loaning the money on short notes and long notes, to tell exactly what the assets of the estate consisted of at any particular date. I can tell exactly what the estate consisted of when I received it. I can show exactly what it consists of at this date.

Q. Can you show approximately what it consisted of?

A. Approximately it has been pretty near the same all the way through. It ought to be exactly the same.

Q. What I mean is you can tell from your credits as to income, what that income arose from?

A. Yes, sir; that is so.

Q. And what constituted the items of the estate?

A. Yes, sir; that is so, but I never have kept a capital-stock account, but there has never been a time when I could not tell, if I were asked, what the assets were, but in consequence of their changing continually from time to time it is difficult for me to go back at any period and find what they were at that period. It can be done, however, from my books, by a careful and expert examination of the sources of income and of the times when investments were made—when specific investments were made.

Q. You will have your book-keeper do the best he can from it at the date of November 20, 1889?

A. Yes, sir; I will do that.

85 By Mr. BALL:

Q. When you received any cash for the estate, was there not a charge in the cash account of that cash?

A. Always.

Q. When you loaned any money on notes cash was always credited, was it not, and bills receivable debited?

A. I never kept any bills-receivable account, but the books which have been kept under my direction relating to this estate show every business transaction, whether of receipt or payment, from one cent to twenty-odd thousand dollars.

Q. Did you keep any stock account?

A. Never kept any capital-stock account.

Q. If you had received $5,000 from the estate, or any other sum, and invested that in stocks, what entry would appear on the books of the estate?

A. The exact amount received and the source from which it was received.

Q. Would the cash account be credited with $5,000 paid out and the stock put in as an asset of the estate, or did you keep separate accounts?

A. There has been nothing kept so far as I know, except a simple cash account. On the one side we have a statement of what we received; on the other side a statement of what we paid out, and everything has gone on it. Now, then, when I would receive $5,000 from any source it would show on this side (indicating), on the other hand it would show, "Bought $5,000 Chartier stock," or "Loaned John Smith $5,000." It would also show this: if I knew I was going to have an amount of money at a certain time ahead, I would look out for an investment for it, and investments at six per cent. were pretty hard to get that were good and safe, and sometimes I would borrow money in order to secure the investment. In

86 looking through this book this morning, the first time in nine years that I went through the account, I saw this entry which I had forgotten all about—"Borrowed from the Farmers' National Bank of Salem," so many thousand dollars (I forgot the amount of money) to loan to John Smith, or somebody, in anticipation of the $23,100 which I expected to get from the Ohio National bank next week or a day or two ahead.

Q. Can you furnish an exhibit showing the amount of money that you paid from time to time for the benefit of Cassius and his family, and also investments made for them, that is, C. B. Hanna, his children or his wife, or any of his children.

A. I never made a dollar of investment for him or his wife or any of his children. I will exhibit my books and the inventory and have copied from them anything you wish, in relation thereto, that is pertinent to this inquiry.

By the MASTER:

Q. Do you know of any investments having been made by him out of the payment made by you to him?

A. I don't know of a dollar's worth of value of any description which Cassius has in this world. I know of several thousand dollars of debts still hanging over him in this city, aside from the claim of the complainants, about which parties are continually writing to me asking if I can find some means of paying them. In this connection there is a most important subject, which to this moment had escaped my mind. Mr. Hanna's will required me to take an account of advances which he had made to his children, Cassius and Arrial, before his death, and strike a balance between the amounts so advanced, and on the final distribution of the estate, to charge Cassius and his family with the excess of advances which had been made to him above those made to Arrial and her children during his lifetime. Cassius and I agreed upon a stated account on those advances several years ago in writing, and the amount so charged against him, which has to be deducted in advance
87 of distribution of the estate among the heirs, and charged against him and his family, amounts to a little more than $52,000.

Q. That is, as you construe the will?

A. I have construed nothing. I simply state what I have done under the will, and the settlement subscribed to, between me and Cassius shows that he received during his father's lifetime, in excess of what his sister and her children have received, a sum amounting to a little more than $52,000. That sum, under the terms of the will, is to be deducted from the share which would otherwise be distributed to Cassius and his family. Cassius' father advanced to Cassius within two years preceding his death more than $36,000, not one dollar of which was ever repaid.

Q. Please state what, if any, amount you have paid of these so-called advances made by Robert Hanna in his lifetime, to his son Cassius.

A. I have never paid one dollar. They were all paid by Mr. Hanna prior to his death.

Q. No; I do not mean that; I mean what portion of the income from the estate you have credited to the other heirs in consideration of his having received advances from Robert Hanna in his lifetime?

A. No such credit, up to this time, has been made. These amounts of advances by Mr. Hanna are held in suspense over Cassius, until the final distribution of the principal of the estate, and then the excess of advances made by Mr. Hanna to Cassius, over those made to Arrial and her children, prior to Mr. Hanna's death, are to be deducted from Cassius' share, so that I have had nothing to do with it, except to agree upon a statement of account with Cassius, as to what that amount should finally be. We had Mr. Hanna's book, the entries in his own handwriting, and from that we made the statement.

Q. Have you invested from time to time any income or increase of this estate for the other heirs of the family of Robert Hanna?
88 A. I never have invested a dollar of the income of the estate for a single heir of Mr. Hanna. All the income, or all

the net income, has been apportioned among the different heirs on the basis of the distribution set forth in the will at the end of each year, and with the single exception of the youngest grandchild, Robert Whitaker, there have been times when every other heir's income account was overdrawn, the same being necessary to properly support them.

Q. How about the investment in the construction of a house on Euclid avenue, that you spoke of in your testimony, some time since? What arrangement was made, who went into possession after the place was constructed and all the particulars in reference to that property known as 1753–'5 Euclid avenue?

A. Mr. Hanna's will provided that the executor may construct and furnish a home for Cassius within a certain limit of expenditure, provided Cassius should demand such investment to be made for him, the will also providing that in case such demand should be made, and such home furnished, Cassius should be charged with six per cent. interest on the investment and taxes and insurance thereon. In consequence of these burdensome conditions and the limited income of the estate, Cassius never asked that such home be constructed, nor was such home ever furnished by me as executor and trustee. At the time of Mr. Hanna's death and for two or three years subsequently thereto, Cassius' family and the children of the deceased daughter, Arrial, were all kept and maintained by me out of the income of the estate at the family homestead, 328 Prospect street. It was necessary for me at that period to provide a suitable home for the three orphan children of the deceased daughter, Arrial. Cassius wife, ever since the death of their mother, had acted in a tender and parental relation toward them, and she seemed to me to be, above all others, the most suitable person to continue to exercise maternal care over them; therefore, I thought it wise to keep the two families together. But shortly after Mr. Hanna's death, the income of the estate declined to such an extent, and the expenses of the Prospect home were so great, the same being a large and expensive mansion to maintain, and the ground attached thereto, that it became indispensable that cheaper quarters should be provided for the joint families. At the time that the providing of a new home was under consideration, I talked with Cassius and his family about a division of the family and furnishing a separate home for Cassius, under the terms of the will, and providing a home for the children of the deceased daughter elsewhere. Cassius refused absolutely to have a new home, saying that he could not afford to have his share of the income diminished by the interest, taxes and insurance, which would be charged against such home. I therefore, simply to save the income of the estate for the children, and to make it go as far as possible for their support, caused a house to be built on lots 1753–'5 Euclid avenue, making the contract or contracts for the construction of the same, paying for the same out of the assets of the Hanna estate, not charging against it a dollar of income, except by way of taxes on the property, until the house was finished and the family moved into it. Mr. Hanna had owned the land for

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many years prior to his death. There was an old unoccupied house on it at the time of his death which I sold for $200, crediting the estate account with it, and I charged the estate with every dollar that was expended upon it. No reference has ever been made in the accounts of the estate to Cassius' having any interest any more than any of the other heirs. Since the house has been occupied by the joint families I have paid the taxes, insurance, repairs, water bills and watchman bills, out of the income of the estate, treating it entirely as property belonging to the estate, and not to Cassius or any of the heirs.

90 Q. Who went into the possession of the home you have just described after its construction?

A. After its completion, Cassius, his wife, his two children and Arrial's three children occupied it. Cassius and his wife had a small amount of furniture which they originally had when they maintained a separate home. They took that furniture with them. Robert Hanna's widow, who died about three months after his death, devised the furniture in the mansion house to the grandchildren, and so each grandchild had a set of furniture, or part of a set of furniture, which each treated as his or her own at that time, and have so done ever since.

Q. What, if any, arrangement had C. B. Hanna and his wife in reference to boarding the children of the daughter, Arrial?

A. Cassius and his wife assumed the expense of maintaining the house out of their share of the income, and we agreed, after moving into the new house, and after consultation with Judge Tilden, of the probate court, that in view of the joint interest which Arrial's children had in the homestead property itself, with Cassius and his family—that if five dollars a week for boarding alone were charged by Cassius and his wife for boarding Arrial's children, that that sum would be about correct; so that from the day they moved into the new house, and in view of their joint ownership of it, I have paid Cassius' wife five dollars a week for the board of each of Arrial's children.

Q. Each one of them?

A. Each one of them.

Q. How many are there of those children?

A. Three. Cassius and his wife, especially his wife, at different times, have thought the five dollars inadequate, but I have always reminded her that the children owned the homestead as much as she did; that she has their furniture, and that for the mere

91 boarding, five dollars a week, under the circumstances, was fair compensation, and that figure has never been changed.

Q. Was any board charged for the children of Cassius?

A. None, for the reason that Cassius and his wife were supposed to defray the expenses of the house out of their share of the income reinforced by the payments which I made them every three months—sixty-five dollars every three months—for each of Arrial's children.

Q. As a matter of fact Cassius and his wife and children have occupied these premises ever since they were constructed?

A. They have shared the occupancy of the house with the deceased daughter's children.

Q. But the deceased daughter's children have paid board?

A. They have paid for their meals at the rate of five dollars a week.

Q. You say the reason Cassius Hanna gave for not wanting a house constructed for him, was that he did not desire to decrease his portion of the income from the estate to the amount that the interest would amount to?

A. Interest, insurance and taxes. He absolutely refused to take it for the reason.

Q. Was there not an item in the codicil doing away with all interest?

A. Not on the homestead. The codicil does provide, contrary to the will, that interest should not be charged against Cassius on the advances made by Mr. Hanna prior to his death. I reminded him of the extraordinary burden that would arise against Cassius, if interest were charged, and on my suggestion he changed it in that respect, so that interest should not be charged on the $52,000.

Q. Of course, the will shows for itself what it is, but there is no item in the will requiring interest to be charged upon advances made by Robert Hanna in his lifetime, is there?

92 A. Yes, sir; I think article ten, of the will.

Q. If you know, you may state when the youngest child of the testator's daughter, Arrial, will arrive at majority.

A. In about four years. As to the value of the estate, I assume the productive estate to be in the neighborhood of $70,000—$65,000 to $70,000—and liable to be increased $5,000 yearly received from royalties, if they continued to be paid. In the year 1889, when your suit was begun, it was then about what it is now, except that it has been increased $10,000 by these royalties of $5,000 a year, so that I cannot be far from right in resting upon the assertion that the productive part of this estate, about November 20, 1889, was in the neighborhood of $55,000. We have received $10,000 since that from coal royalties, and that is about what it is. I examined the books this morning for the first time since I have had charge of the estate, having devolved the work of making entries upon two gentlemen, who, at different times, were in my employ as stenographer and book-keeper. I gathered from these books, first, an independent statement of the assets of Mr. Hanna's estate, as they came to me and figured out what amount of money I have received from those assets. The footing was $90,573.31. I then went through the present assets of the estate to see how there present value compared with what I had received from them as given to me by Mr. Hanna, and found that the present assets amounted to $90,946, showing from this hasty examination a difference of principal between now and then of only about $300, which a more careful examination of the books will undoubtedly explain or account for. On the one hand it represents the money actually received from such portion of the assets as any money has been received from, and, on the other, the present actual value of assets, not taking into account lands

which have not been sold, stocks and notes, from which a dollar has never been received.

93 Q. Then there is no real estate included in this inventory?

A. Only the $22,500, referring to the difference I paid in trade for the Cowles hom-stead. I traded as an investment in real estate. That, and the cost of the homestead, and there is pretty near $526 of an assessment which we had to stand in this mining company which Solon Burgess is president of, and $50 in another, whose headquarters is in Philadelphia. Knowing that I have never lost a dollar of principal, I have never been particular about keeping posted from time to time about how the assets figured up. Of all the investments which I have made there has never been a loss of one dollar of interest or principal, except in relation to one $500 investment, the principal of which was fully paid, and all the interest fully paid, except $2.50, and, in order to maintain my record unbroken for collecting every dollar which was due to the estate, I paid the $2.50 into the estate from my own pocket, and the books show the transaction.

Q. You say the $22,500, paid to Mr. Cowles, in the exchange of real estate, was entered up and carried along as an asset of the estate, as an investment in real estate for the benefit of the estate. What, if any, entry was made in reference to the $10,000 invested in this house that was constructed, into which Cassius and his family moved after its completion?

A. I have never entered into an asset account the money which I paid Edwin Cowles on the trade referred to; nor have I ever entered into an asset account the expenditure made for the new house on Euclid avenue. I simply entered into my cash account the disbursements made, and the payment of the $22,500 to Cowles, and the cost of the house, the items being stated from time to time, and the vouchers taken as the payments were made.

94 By the MASTER:

Q. The $10,500 invested in the house, was the money received from the estate in the way of income or increase?

A. That was paid out of money in my hands as executor or trustee. I have never distinguished in the cash which I have had on hand at any time between the principal and interest; that is purely a matter of book-keeping, and was settled definitely at the end of each year. So far as the net income was concerned, I kept an account with each heir as to his or her share of the income, and credited each heir with the amount of the net income due to it at the end of the year, during which payments were made on account of it.

Q. What is your opinion in reference to the value of the Euclid-street property that Cassius and his family have lived in since it was completed?

A. Cassius has not lived in the house for nearly four years. I have no knowledge of the value of the property. I have never tried to sell it and I have never had an offer for it, and am not familiar with the value of real estate in that part of Cleveland.

Q. What would (you) say of the value of the Prospect-street property at the time you sold it, if you know?

A. The Prospect-street homestead was unoccupied, if my memory serves me right, nearly a year and a half after the heirs vacated it, during which time nearly all the lead and brass pertaining to the plumbing system was stolen. For a year prior to the time the heirs vacated it, also during all the time it was vacant and during all the time it was rented, and down to the time when I made the trade with Edwin Cowles in July, 1889, I made efforts by advertising in the papers and by negotiations with various real-estate agents in the city to sell it. I never succeeded in getting but one offer on the property, and that was equivalent to about
$30,000 during the period mentioned, and in consequence
95 of the deterioration of the property while idle, I was glad to
have a tenant in it at the nominal sum of $100 a month; but the insurance, taxes and repairs consumed nearly all that sum. At one point of the period referred to when I was trying to sell this property there were twelve other residence properties advertised for sale in the same part of Prospect street, between Perry and Sterling avenue. I offered repeatedly to take $40,000, but never got an offer within $10,000 of that sum. Having offered to sell it at $40,000, I would naturally place its value at the time of the trade with Mr. Cowles at about $40,000. Supposing his property to be worth the difference between that sum and $62,500, I was glad to make the exchange I proposed with Mr. Cowles, and paid him the difference named. But before doing that, and in order that my action in the premises might stand scrutiny at any time in the future, I took the pains to get the opinion, in writing, of five leading owners of real estate in Cleveland, both as to the value of the Hanna homestead and of the Cowles property. These gentlemen differed somewhat in their estimate on the value of the Hanna homestead, some putting it as low as $25,000, others as high as $45,000. They all agreed that the Cowles property was worth from sixty to sixty-five thousand dollars, and gave me their opinion in writing that if I could exchange for the difference of $22,500, that I would make a good trade for the Hanna estate. I have preserved those papers carefully among my papers relating to the Hanna estate. Judge Cleveland was one of the men who gave me their opinion in writing; Captain Bradley was another; Henry B. Payne was another; also E. B. Hale, and I think, James Tracy.

Q. What would (you) say is the present value of the real estate on the corner of Erie and Superior streets that you got of Mr. Cowles?

A. My impressions are that the property is worth $80,000.

96 By Judge DICKEY:

Q. How long and how intimately have you been acquainted with Cassius B. Hanna and Robert Hanna, the decedent?

A. I cannot recollect the time when I did not know them both, and intimately, during all this period to the extent of the interchanging visits between the different homesteads all our lives.

Q. What was the financial condition of Cassius B. Hanna at the time of the execution of the will and codicil, and for several years immediately prior thereto?

A. He was utterly insolvent. He had very large liabilities hanging over him, and he never had the faculty of getting any money, or paying his debts.

Q. Please state what you know as to the knowledge that his father had of his financial condition, at the time of the execution of the will.

A. His father knew all about it. He knew it twelve years before he died, because I drew his first will in 1870. So far as the relation of Cassius was concerned to the holding of property or the withholding of property from him, giving him an income from time to time, as I thought proper, that will of 1870, was exactly as the one that was finally carried into effect.

Q. Prior to the execution of this will, what statement, if any, did Robert Hanna, the testator, make to you or in your presence, upon the subject of the financial condition of Cassius B. Hanna, or his ability to keep and care for property?

Objected to.

A. He told me when the subject of the drawing of his will was introduced, that his son, Cassius B. Hanna, had large debts over him, and always had had, and that he knew that he never could take care of property enough to even have a home, so far as
97 the boy himself was concerned. Therefore, he wished me to draw his will in such form as to at least make sure of his having a home, and tie it up in such shape that his creditors never could get it.

By Mr. BALL:

Q. What kin are you to Robert Hanna and Cassius B. Hanna?

A. Cassius is my full cousin. Mr. Hanna married my father's sister.

Q. Where is C. B. Hanna at this time, if you know?

A. He was in Chicago within ten days.

Q. Is he located in business there?

A. I don't know.

Q. Do you know his address other than the city of Chicago?

A. I think he directed his last letters to be sent to No. 11 Adams street.

Q. What, if anything, is he doing at the present time?

A. I don't know. I will add that the estate never received one dollar from Cassius' interest in the Colorado stamp-mill property, so called. That property was subject to a prior mortgage held by New York parties, and on a negotiation with them, their lien extending over the principal part of the property, I agreed to surrender all the claims of the Hanna estate on the property, for the sum of $900. I then offered to Cassius, either to accept that money for, and in behalf of the estate, giving his credit to that amount in the advances which his father had made to him prior to his death, or I

would give Cassius the $900 and continue to charge against him the total amount advanced to him by his father prior to his death. Cassius accepted the latter, as it gave him $900 in hand to pay some pressing debts.

(Correct.) J. T. BROOKS.

98 EXHIBIT "A," SHOWING ALL ASSETS OF THE ESTATE.

Exhibit "A," showing list of all assets of estate of Rob't Hanna, deceased, which have ever come into my possession; also in extreme right-hand column all cash received on all of assets.

	Nominal value or par value.	Am't actually received.
Union Steel Screw Co. stock	$17,000 00	$17,000 00 (still on hand.)
Ohio National bank	23,100 00	23,100 00
Lake Shore & Tus. Valley Rd. Co.	1,000 00	
Chippewa Mining Co	53,750 00	
Sun Fire Insurance Co	100 00	
West Hickory Oil & Mining Co	32,750 00	786 00
Hickory Farm Oil Co	16,435 00	394 44
C. G. Hussey Pacific Gold & Quartz Mining Co		
Resolute Fire Insurance Co	10 00	
Lorillard Fire Insurance Co	20 00	
H. O. King Pgh. Fire Steel Mining Co		
W. Bisson Fire Steel Mining Co		
Detroit, Mich., North American Mining Co		
Leonard Hanna and H. Garretson, joint owners		
Ohio Mining Co., one-third interest		
Erie Mining Co	25,000 00	
Hanna, Garretson & Co., one-third interest	36,000 00	
Continental Improvement Co	750 00	2,950 00
Cleveland & Sierra Hydraulic M. Co	25,000 00	
Hand Gold Mining Co	15,500 00	
Standard Oil Paint Co		267 34
Ohio Trap Rock Mining Co		
Note of Fred. K. Leach, Jr	3,000 00	800 00
W. H. Collins' note	30 00	
H. C. Brainard	261 31	
A. B. McNairy and G. H. Hessin	10,000 00	10,000 00
F. Leach, draft on R. H.		
Cherry Valley Iron Co., note	1,480 86	1,000 00
Notes of Charles H. Tucles	1,000 00	
Tryphena Nichols	50 00	
R. A. Hapgood	25 00	
Int. in old assets Ohio National bank. (Estimated $1,100)	4,036 65	922 65
Cherry Valley Iron Co. bonds	4,800 00	
Cherry Valley Iron Co. notes	240 40	
Letonia Iron & Coal Co. note	5,000 00	1,907 76
C. B. Hanna note	200 00	
C. B. Hanna note	300 00	
C. B. Hanna note	5,000 00	
Note, C. B. and H. L. Hanna, secured by mortgage	16,900 00	
C. C. Davidson, draft on C. B. H., pd. by R. H	1,000 00	
C. C. Davidson, draft on C. B. H, pd. by R. H	1,000 00	
C. B. Hanna, promissory note, order Stebbins, Post & Co.	8,100 00	
C. B. and H. L. Hanna, promissory note	8,000 00	
Int. in Citizens' Saving & Loan Assn	6 33	6 45
Osage Mining Co	25,000 00	
*Homestead property, 328 Prospect street		
Euclid-avenue property, 1753–55		200 00
Hocking county lands		30,000 00
Illinois lands		880 55
Missouri land, 320 acres		

120 acres in Michigan	
Estate of Harriet Hanna, deceased	35 12
Family carriage	75 00
Int. in Hessin partnership, in Tennessee lands	75 00

*In July, 1889, I exchanged this property with Edwin Cowles for his property, cor. Superior and Erie streets (64 feet on Superior), with $22,500 additional, of which amount I paid Cowles in cash, $2,500, and assumed his mortgage of $20,000 to Mr. Rawson, of Newton, which was due April 11, 1891, and paid at that time.

Assets in Possession of J. T. Brooks, Nov. 20, 1889.

99 Assets of the estate of Rob't Hanna, deceased, in charge of J. T. Brooks, executor and trustee (as near as can be estimated at this time) on November 20, 1889.

Lot cor. Superior and Erie streets, Cleveland, 63 x 166 ft., estimated value	$75,000 00
1753–55 Euclid avenue, 107 x 350 ft., estimated value	25,000 00
160 acres Hocking county, Ohio, estimated value	30,000 00
320 acres Morgan county, Mo., estimated value	1,600 00
132½ acres Houghton county, Mich., estimated value	650 00
160 acres Marquette county, Mich., estimated value	800 00
40 acres Whiteside county, Ill. (since sold), estimated value	400 00
Union Steel Screw Co., 212 shares $100 each par value	21,200 00
Pittsburgh, Wheeling & Kentucky R. R. Co., 228 shares $50 each, cost (since sold)	11,000 00
Note of Chas. T. Brooks (since paid	1,045 00
Note of J. J. Brooks (since paid)	1,671 00
Note of W. C. Boyle (since paid)	3,100 00
Note of Ideal Plow Co. (since paid)	500 00
Note of Jno. E. Davidson (since paid)	1,200 00
Note of J. J. Brooks, secured by collaterals and interest paid to last semi-annual period	7,023 54
On deposit with Farmers' National Bank of Salem, till investment could be found (since invested)	5,000 00
Note of R. V. Hampson (since paid)	3,000 00
Notes of Cassius and Hattie Hanna, and of Hattie alone, the wife of Cassius	1,950 00
Sun Fire Insurance Co., 5 shares $20 each	Worthless.
Chippewa Mining Co. stock, par value, $53,750	Worthless.
Lake Shore & Tuscarawas valley, par value, $1,000	Worthless.
Resolute Fire Insurance Co., par value $10	Worthless.
Lorillard Fire Insurance Co., par value $20	Worthless.
Fire Steel Mining Co. North American Mining Co. Erie Mining Co. Ohio Mining Co. — Owned jointly by Hanna estate and Hanna, Garrison & Co. Total par value $60,000	Worthless.
Cleveland & Sierra Hydraulic Mining Co., par value $25,000	Worthless.
Hand Gold Mining Co., par $15,500	Value unknown.
Ohio Trap Rock Mining Co., worthless certificate never found.	
Note of W. H. Collins, $30	Worthless.
F. Leach draft on R. Hanna, $150	Worthless.
Note of H. C. Brainard, $261.31	Worthless.
Note of Chas. H. Tucker, debt cancelled but not paid.	
R. A. Hapgood note $25	Worthless.
Interest in old assets Ohio National bank	Believed worthless.
Cherry Valley Iron Co. bonds, $4,800	Worthless.
Cherry Valley Iron Co. notes, $240.40	Worthless.
Osage Mining Co. shares, par value $25,000, believed worthless (may be worth $1,000.)	
Balance on deposit with State National bank about $50.	

The above statement I declare to be correct to the best of my knowledge and belief, and I wish the same attached as an exhibit to my testimony in the suit of Raynolds *vs.* C. B. Hanna and others, in circuit court, United States, Cleveland, Ohio.

J. T. BROOKS.

Present Assets in Possession of J. T. Brooks, Nov., 1891.

Present assets of the estate of Robert Hanna, deceased, in the custody of J. T. Brooks, executor and trustee, November, 1891:

Property corner Erie and Superior streets, Cleveland, estimated value,		$75,000 00
Homestead property, 1753–55 Euclid avenue, estimated value		25,000 00
160 acres land in Hocking county, Ohio, estimated value		30,000 00
320 acres land in Morgan county, Missouri, estimated value		1,600 00
132½ acres land in Houghton county, Michigan, estimated value		650 00
160 acres in Marquette county, Michigan		800 00
212 shares stock in Union Steel Screw Co., par		21,200 00
200 shares stock in Chartiers R'y Co., par		10,000 00
100 Note of J. J. Brooks, secured by collateral		7,023 54
" J. McDonald and others, joint and several		1,250 00
Note of Episcopal church, Dayton, Ohio		1,000 00
" Miss Hattie Whitaker		1,000 00
" Annie C. and Howard Blair, secured by mortgage		1,500 00
" U. R. Sigler		2,316 00
" C. B. and H. L. Hanna		1,950 00
Stock of Sun Fire Insurance Co., par $100		Worthless.
Chippewa Mining Co., stock, par $53,750		Worthless,
Lake Shore & Tuscarawas Valley stock, par $100		Worthless.
Resolute Fire Insurance Co., par $10		"
Lorillard Fire Insurance Co., par $20		"
Fire Steel Mining Co.	Owned jointly by Hanna estate in connection with Hanna, Garrison & Co., par value, $60,000	
North American Mining Co.		
Ohio Mining Co.		
Erie Mining Co.		Worthless.
Cleveland & Sierra Hydraulic Mining Co., par $25,000		Worthless.
Osage Mining Co., stock, $28,425, on which $6.65 per share only have been paid. Estimated value, $1,000.00		
Hand & Barlow United Gold Mines and Hydraulic Works of Georgia, par $7,750. Estimated value, $1,500.00		
(This stock received in exchange for $15,500 par in Hand Gold Mining Co. in 1890, value of which stock is supposed to be the same)		
Ohio Trap Rock Mining Co. certificates never found		Worthless.
Note of W. H. Collins, $30		"
Note of H. C. Brainard, $261.31		"
Note of F. Leach, sight draft on R. Hanna, $150		"
Note of Charles H. Tucker, $1,000; note cancelled: not paid		
Note of R. A. Hapgood, $25		Worthless.
Interest in old assets, Ohio National bank		Believed worthless.
Cherry Valley Iron Co.; bonds, $4,800		Worthless.
Cherry Valley Iron Co.; notes, $240.40		"

The above statement of present assets, I believe to be full and correct, and I desire to add, as part of my testimony, under oath, that in the administration of the estate of Robert Hanna, deceased, as executor and trustee, I have never lost a dollar of either principal or interest in any investment I have made for said estate, and in the division and expenditure of the net income on account of the various beneficiaries under the will; I have exercised the best judgment and discretion of which I have been possessed, as to what the best interests of each of the beneficiaries required; what their condition

in life, and the amount of property each was likely to receive from said estate, entitled them to have, and in accordance with my own powers and duties under the will, as I understood it.

J. T. BROOKS.

Detailed Income Account, Nov. 1 to Dec. 31, 1889.

1889.			
Nov.	1.	Interest on various deposits in Farmers' National	$45 48
"	5.	Rent from the Superior-street property	170 00
Dec.	6.	Rent from the Superior-street property	110 00
"	10.	Interest on $5,000 deposited with Farmers' National	234 17
"	24.	Four per cent. dividend on U. S. S. Co. stock	848 00
"	28.	Interest for money borrowed to pay Ford note	18 76
		Gross income	$2,274 41

(Last item should be omitted.)

101 *Expenses Account from Nov. 1 to Dec. 31, 1889.*

Nov.	5.	Paid Cowles commission on rent from Superior-street house			$8 50
"	7.	"	Richardson & Taylor taxes and commission on Morgan Co., Mo., land		9 00
"	18.	"	Col. Co. Mutual Ins. Co. insurance on homestead		6 00
"	21.	"	Interest on note given to Farmers' National		40 86
Dec.	6.	"	J. G. Cowles, commission on rents Superior-street house		5 50
"	16.	"	B. Hallen, Jr., Hocking county, Ohio, taxes		49 68
"	16.	"	D. H. Kimberley, Jr., Cuyahoga county, taxes		357 97
"	16.	"	W. H. Williams, Jr., Marquette county, Mich., taxes		5 15
"	16.	"	D. Caven, Houghton county, Mich		5 15
"	31.	"	Repairs to Euclid-avenue house, viz:		
			Campbell	$7 75	
			Dorman & Co	6 80	
			Sprinkling	8 00	
					22 50
			Expenses		$1,110 64

Gross income		$2,274 41	
Expenses		1,110 64	
Net income	(2)	1,163 77	
Hanna share	(3)	581 88	
Whitaker share		193 96	each.

Detailed Income Account, 1890.

1890.			
Jan.	11.	Rent from Superior-street property	$110 00
Feb.	7.	" " " "	110 00
"	11.	Interest on Ideal Plow Co. note	15 00
M'ch	1.	Interest on R. V. Hampson note	165 00
"	3.	Dividend on U. S. S. Co. stock	636 00
"	15.	Rent from Superior-street property	110 00
Apr.	1.	Profit made on P., W. & K. deal	2,150 00
"	1.	Dividend on P., W. & K. stock	342 00
"	1.	Dividend on Chartiers Railway Co. stock	125 00
"	1.	Interest on W. C. Boyle note	93 00
"	4.	Rent from Superior-street property	118 00
"	4.	Dividend on U. S. S. Co. stock	636 00
"	10.	Interest on G., R. & I. bonds	70 00
May	5.	Interest on loan to G., R. & I. Co	105 00
"	7.	Dividend on U. S. S. Co. stock	848 00
"	14.	Rent from Superior-street property	118 00
June	28.	" " " "	118 00
July	3.	Dividend on U. S. S. Co. stock	848 00
"	16.	Rent from Superior-street property	118 00
Aug.	1.	Interest on J. E. Davidson note	36 00
"	1.	Sale of P., W. & K. script dividend	18 00
"	18.	Rent from Superior-street property	118 00
"	30.	Dividend on U. S. S. Co. stock	848 00
Sep.	13.	Interest on Ideal Plow Co. note	15 00
"	22.	Rent from Superior-street property	118 00
"	27.	Interest on J. J. Brooks	51 25
Oct.	4.	Interest on G., R. & I. bonds	70 00
"	4.	Dividend on Chartiers Railway Co. stock	300 00
"	24.	Rent from Superior-street property	118 00
"	30.	Dividend on stock Union S. S. Co	1,060 00
Nov.	17.	Interest on W. C. Boyle note	93 00
"	18.	Rent from Superior-street property	118 00
Dec.	13.	Interest on C. E. Brooks' note	62 70
"	16.	Rent from Superior-street house	118 00
"	30.	Dividend on Union Steel Screw Co. stock	1,060 00
			$11,038 95

Gross income		$11,038 95	
Expenses		2,477 87	
Net income	(2)	8,561 08	
Hanna share	(3)	4,280 54	
Whitaker share		1,426 84	2 3 each.

102 *Expense Account*, 1890.

1890.			
Jan.	11.	Paid Cowles commission on rents collected	$5 50
"	13.	" M. L. Young as premium on ins. policy No. 15833	20 00

Feb.	7.	Paid	Cowles commission on rents from Superior-street house	5 50
M'ch	1.	"	Farmers' National bank int. on note, $1,600: 1–3, '90	11 87
"	15.	"	Cowles commission on rents from Superior-street house	5 50
"	17.	"	F. D. Ramsey fee in matter of title to Illinois land	15 00
"	24.	"	F. D. Ramsey cost of abstract in same matter	12 42
April	4.	"	Cowles commission on rents from Superior-street house	5 90
"	9.	"	Interest on note $20,000 to Mrs. Susan Rawson	600 00
"	15.	"	M. L. Young as premium on insurance on Superior-street house	45 00
"	23.	"	O. A Oliver for exchange draft, sale of Illinois land	1 00
May	3.	"	Farmers' National bank, int. on note dated March 4, '90	26 85
"	3.	"	Farmers' National bank, int. on note dated April 10, '90	17 50
"	3.	"	Farmers' National bank, int. on note dated April 18, '90	1 25
"	14.	"	commission to Cowles on Superior-street house rent	5 90
June	16.	"	treasurer Cuyahoga Co. taxes on Cleveland property	357 97
"	28.	"	Cowles commission on rents Superior-street house	5 90
July	2.	"	C. D. Wade, glazing Euclid-avenue house	10 50
"	16.	"	F. M. Gorsuch, fixing roof Superior-street house	30 00
"	16.	"	F. Clifford, fixing tin roof Superior-street house	6 00
"	16.	"	Cowles commission on rents Superior-street house	5 90
Aug.	8.	"	Cowles commission on rents Superior-street house	5 90
Sept.	4.	"	Farmers' National bank, int. on note dated July 19, '90	13 08
"	4.	"	Farmers' National bank, int. on note dated Aug. 1, '90	21 23
"	22.	"	Cowles commission on rents Superior-street house	5 90
Oct.	1.	"	W. H. Aylard, painting, etc., Euclid-avenue house	63 12
"	4.	"	H. L. Hanna, to settle plumbing bill	15 63
"	24.	"	Cowles commission on rents Superior-street house	5 90

Nov.	1.	Paid	Farmers' National bank, int. on note dated Sept. 6, '90	6 39
"	1.	"	Farmers' National bank, int. on note dated Oct. 4, '90	7 50
"	5.	"	interest on Rawson note	600 00
"	17.	"	taxes and commission in Missouri land.	16 20
"	18.	"	Cowles commission on rents Superior-street house	5 90
Dec.	10.	"	taxes, 1890, on Hocking county, O., land.	55 70
"	10.	"	taxes, 1890, on Cuyahoga county, O., land	457 50
"	11.	"	Day & Leaton commission sale of G., R. & L. bonds	2 50
"	13.	"	Farmers' National bank on note dated Nov. 1, 1890	14 28
"	16.	"	commission to Cowles	5 90
"	18.	"	taxes, 1890, on Marquette county, Mich., land	5 54
"	18.	"	taxes, 1890, on Houghton county, Mich., land	4 21
"	31.	"	H. L. Hanna, various repairs about Euclid avenue	199 93
				$2,477 87

Detailed Income Account January 1 *to September* 1, 1891.

1891.			
Jan.	8.	Interest on Monsaratt note	$150 00
Feb.	12.	Rent from Superior-street property	218 00
"	25.	Div. on U. S. S. Co. stock	636 00
M'ch	7.	Interest on Ideal Plow Co. note	15 00
"	12.	Rent from Superior-street property	136 00
Apr.	1.	Dividend on Chartiers R'y Co	350 00
"	7.	Interest on note of W. C. Boyle	96 00
"	"	" " " N. Monsaratt	150 00
"	"	" " " Ideal Plow Co. note	22 50
"	4.	" " " Hurd Coal & Iron Co.	337 00
"	10.	Rent from Superior-street property	118 00
"	"	Interest on O. A. Oliver note	11 75
"	16.	Dividend on Union Screw Steel Co. stock	636 00
May	23.	Interest on C. F. Brooks note	27 00
"	"	" " J. J. Brooks note	116 00
"	20.	Rent from Superior-street property	120 00
J'ne	18.	" " " " "	120 00
"	30.	Dividend on U. S. Screw Co. note	636 00
July	2.	Interest on J. J. Brooks note	305 41
"	"	" " " "	149 27
"	17.	Rent on Superior-street property	120 00
"	"	Interest on Sigler notes	30 00
"	"	" " " "	138 96

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Aug.	14.	Rent on Superior-street property	120 00
"	"	Interest on J. J. Brooks note	33 75
"	"	" " " " " "	52 00
"	"	" " " " " "	76 59
"	"	" " " " " "	421 41
"	"	" " C. F. Brooks note	22 64
"	"	Dividend on Union Steel Screw Co. stock....	636 00
			$6,021 28

Gross income	$6,021 28	
Expense account	1,842 00	
Net income.....(2)	4,179 28	
Hanna share .....(3)	2,089 64	
Whitaker share	696 54	each.

Expense Account from January 1 *to September* 1, 1891.

Feb.	12.	Interest on note Farmers' National bank	$82 00
Apr.	12.	Commission and repairs, Superior-street house	26 90
M'ch	12.	" to Cowles, " " "	6 80
Apr.	10.	" " " " "	5 90
"	11.	Interest on Rawson note.....	600 00
"	14.	Painting and papering Euclid-avenue house .	250 00
"	16.	Discount on note to First National bank	42 00
"	17.	Cost of releasing mortgage, Cowles to Rawson	1 25
"	17.	Discount on note to State National bank	7 75
May	20.	Commission to Cowles and repairs to Superior-street house.....	13 39
June	10.	Taxes on Euclid-avenue and Superior-street properties	385 69
"	17.	Paid Campbell for repairs, Euclid avenue....	43 20
"	18.	Interest on note to First National bank, P'gh.	42 00
"	18.	Commission to Cowles, Superior-street house.	6 00
"	19.	Discount on note to State National.....	12 25
July	3.	Repairs to Euclid-avenue house	384 87
"	17.	Paid Cowles as commission on rent.....	6 00
Aug.	14.	" " " " "	6 00
			$1,842 00

Letter from J. T. Brooks Having Reference to His Testimony.

PITTSBURGH, *November* 20, 1891.

Irvin Belford, clerk United States circuit court, Cleveland, O.

DEAR SIR: Herewith please receive two pages, headed, "Present assets of the estate of Robert Hanna, deceased, etc.," which I wish you to substitute for the half sheet now embodied in my testimony, and marked, "Present assets, etc.," the latter half sheet to be taken out and destroyed, as the same was nothing but a memorandum

made by me from my recollection, and, in the absence of my books, of the investments on account of principal which I have made as executor and trustee of the estate.

I have taken the liberty of adding a fragment of testimony, which I wish incorporated with the balance of my testimony, as taken under oath before you. Kindly call Mr. Ball's or Mr.
104 Wing's attention to it, and, if they wish to cross-examine me further, I will put myself at their disposal. I have also written to my attorneys about it, and sent them a copy of the enclosures. I was not able to verify absolutely until I returned to my office yesterday morning the correct figures representing the notes which I hold against C. B. Hanna and his wife, Hattie. The correct amount is given on the enclosed, viz., $1,950. Will you kindly glance over the written portion of my testimony, and change $1,850 to $1,950 wherever it occurs.

I also wish the contents of the letter, which I wrote you, in explanation of the item relative to New York Central stock to be incorporated in my testimony, in order that by no possibility of mistake, can the existence of that item in the book be construed to my disadvantage now or hereafter.

The courtesies, which have been extended, to *be* by yourself and counsel for the plaintiff in the taking of my testimony have been so conspicuously kind, that I cannot forbear repeating assurances of my gratitude to yourself, and to Mr. Wing, and to Mr. Ball.

Yours respectfully, J. T. BROOKS,
Executor and Trustee, R. Hanna, Deceased.

By consent of both parties, this letter, as far as competent, is to be taken as the testimony of J. Twing Brooks.

Attest: IRVIN BELFORD,
Special Master.

Letter from J. T. Brooks Containing Explanations.

PITTSBURGH, *Nov.* 13, 1891.

Irvin Belford, clerk of court, Cleveland, Ohio.

MY DEAR SIR: I submit the following explanations on points asked by you of my stenographer and book-keeper, Mr. Oliphant, in the suit of Raynolds *vs.* C. B. Hanna and others, as follows:

1. As to item received from F. B. Wallace & Co., $15,215.80, on page two of my cash book: The day before Robert Hanna was buried, and of course before his will had been opened, I learn from his son, incidentally, that the father was carrying 1,000 shares of
105 New York Central stock, on a margin with F. B. Wallace & Co., brokers, Broad street, New York, also that he had given an order for an additional 1,000 shares in case the stock should drop to a certain figure. The quotations of the stock for that day were within one-half of one per cent. of the figures named by Mr. Hanna for the purchase of the additional 1,000 shares. On learning this fact I telegraphed immediately to Wallace & Co. that Mr. Hanna

was dead and that the order for the additional 1,000 shares should be cancelled, and about 11 o'clock the next day, being the day of the funeral, I received an answer to that message, saying that my message was received and the additional order cancelled. The funeral took place at 2 o'clock in the afternoon, and when we returned from the cemetery, a glance at the evening paper told us that New York central had dropped to the figure named by Mr. Hanna, so that by our early action we prevented the purchase of the additional 1,000 shares. Immediately after Mr. Hanna's death, and on examination of his papers, I learned that the 1,000 shares of New York Central, which had already been bought, were protected by a margin of $15,000 which he had deposited with Wallace & Co. He had borrowed this $15,000 as follows: December 28, 1881, of Second National bank, Cleveland, $10,000, payable on demand. January 28, 1882, of Ohio National bank, $5,000.

New York Central dropped within thirty days from the time of Mr. Hanna's death about eight per cent. It then rallied to about the price Mr. Hanna had paid for it, and I then ordered the 1,000 shares sold, and received statement from F. B. Wallace & Co., dated June 19th and 21st, returning the margin and interest on the margin, $15,215.80, less commissions, being the exact item which is found on page 2 of my cash book. The money borrowed by Mr. Hanna at Second National bank was bearing seven per cent. interest. I paid that money on May 8th and borrowed the money at six per cent. at the Farmers' National bank, Salem. This loan I paid with interest June 24th, and I paid the $5,000 loan to the Ohio National, June 28th. I regret deeply to be compelled to make this disclosure of Mr. Hanna's personal affairs, but I am confident that yourself, Frank Wing, and Mr. Ball, will not make any unnecessary disclosure of them.

2. In regard to the stock dividend of the Union Steel Screw Co., (42½ shares) which was made February, 1883, I credited the
106 total amount of this dividend to income for this year. I sold the odd share for seventy-five dollars cash, and instead of dividing the stock among the heirs, I kept it for the estate, and divided a like amount of cash among them. The inventory of the Hanna estate shows that at the time of his death he had $17,000 of the Screw Co. stock. My testimony shows that the estate now has $21,200 of this stock. I never made an entry on the books of the addition of this stock to capital stock, because, as stated heretofore in my testimony, I never have kept a capital-stock account.

3. I enclose copy of lease with Columbus & Hocking Coal & Iron Co.

Yours respectfully,

J. T. BROOKS,
Executor and Trustee, R. Hanna, Deceased.

By consent of both parties the foregoing letter is to be considered a part of the testimony of J. Twing Brooks, as far as the same may be competent.

Attest:

IRVIN BELFORD,
Special Master.

Statement of Income Account.

Aug. 4, 1882, by amount paid C. B. Hanna, account of income	$135 00
Aug. 4, 1882, by amount of income paid C. B. Hanna, by account of income	1,300 00
Oct. 2, 1882, amount paid C. B. Hanna, account of income for year ending March 31, 1883	625 00
Oct. 16, 1882, by amount paid C. B. Hanna on account of income	500 00
Nov. 27, 1882, by amount paid C. B. Hanna on account of income	100 00
Dec. 11, 1882, by amount paid C. B. Hanna on account of income	100 00
Jan. 18, 1883, by amount paid C. B. Hanna on account of income	625 00
March 31, 1883, by amount paid C. B. Hanna and H. L. Hanna on acc't of income	1,400 00
May 3, 1883, by amount paid C. B. Hanna on account of income	625 00
June 30, 1883, by amount paid C. B. Hanna on account of income for year ending March 1, 1884	625 00
Sept. 30, 1883, by amount paid C. B. Hanna on account of income	625 00
Dec. 17, 1883, by amount paid C. B. Hanna in advance on account of income	150 00
Dec. 31, 1883, by amount paid C. B. Hanna on account of income for year ending March 31, 1884	475 00
May 5, 1884, by amount paid C. B. Hanna on account of income for year ending March 31, 1885	300 00
June 30, 1884, by amount paid C. B. Hanna and wife on account of income for year ending March 31, 1885	400 00
Sept. 30, 1884, by amount paid C. B. Hanna and wife on account of income for year ending March 31, 1885	600 00
Nov. 24, 1884, by amount paid C. B. Hanna, to apply on account of income for year ending March, 1885	75 00
Dec. 30, 1884, by amount paid C. B. Hanna and wife on account of income for year ending March 31, 1885	264 68
April 7, 1885, by amount paid C. B. Hanna and wife on account of income	200 00
May 6, 1885, by amount paid C. B. Hanna and wife on account of income	100 00
March 31, 1886, by amount paid C. B. Hanna and wife on account of income	50 00
July 23, 1886, by amount paid C. B. Hanna and wife, as advanced on account of income for year ending Dec. 31, 1886	50 00
Sept. 30, 1886, by amount paid C. B. Hanna and H. L. Hanna on acc't of income	250 00
Dec. 31, 1886, by amount paid C. B. Hanna and wife for amount advanced them on account of income	150 00

March 31, 1887, by amount paid H. L. Hanna on account of income from said estate..... 300 00
May 25, 1887, by amount advanced C. B. and H. L. Hanna on acc't of income..... 75 00
June 30, 1887, by amount advanced C. B. and H. L. Hanna on account of income..... 250 00
107 Sept. 30, 1887, by amount advanced C. B. and H. L. Hanna on account of income..... 125 00
Dec. 9, 1887, by amount advanced C. B. and H. L. Hanna on account of net income from said estate..... 50 00
Jan. 1, 1888, by amount advanced C. B. Hanna and wife on account of income..... 150 00
Dec. 9, 1887, by amount advanced H. L. Hanna on account of income Robert Whitaker..... 10 00
Jan. 30, 1888, by amount advanced C. B. Hanna and wife on account of income..... 200 00
March 31, 1888, by amount advanced C. B. and H. L. Hanna on account..... 300 00
June 11, 1888, by amount advanced C. B. and H. L. Hanna on account of income..... 100 00
July 1, 1888, by amount advanced C. B. and H. L. Hanna in advance on account of share of net income..... 300 00
Sept. 9, 1888, by amount advanced C. B. Hanna on account of income..... 650 00
Dec. 12, 1888, by amount advanced C. B. and H. L. Hanna on account of income..... 50 00
Dec. 31, 1888, by amount advanced C. B. and H. L. Hanna on account of share of net income..... 736 10
March 30, 1889, by amount advanced C. B. and H. L. Hanna on account of income..... 600 00
July 1, 1889, by amount advanced C. B. and H. L. Hanna on account of income..... 600 00
August 19, 1889, by amount advanced C. B. Hanna on account of his share of net income..... 100 00
Oct. 1, 1889, by amount advanced C. B. and H. L. Hanna on account of income..... 600 00
Dec. 16, 1889, by amount advanced C. B. and H. L. Hanna on account of income..... 50 00
Dec. 1, 1889, by amount advanced C. B. and H. L. Hanna on account of income..... 300 00
Dec. 31, 1889, by amount advanced C. B. Hanna on account of income..... 150 00
Jan. 29, 1890, by amount advanced H. L. Hanna on account of income..... 50 00
Feb. 10, 1890, by amount advanced C. B. Hanna on account of income..... 50 00
April 1, 1890, by amount advanced C. B. and H. L. Hanna on account of income..... 300 00
April 17, 1890, by amount advanced C. B. Hanna on account of net income..... 100 00

May 9, 1890, by amount advanced C. B. Hanna on account of income..... 300 00
June 5, 1890, by amount advanced H. L. Hanna on account of income..... 300 00
June 27, 1890, by amount advanced C. B. Hanna on account of income..... 50 00
June 30, 1890, by amount advanced C. B. and H. L. Hanna on account of income..... 300 00
July 19, 1890, amount advanced H. L. Hanna on account of Robert Whitaker, income..... 50 00
August 12, 1890, by amount advanced C. B. Hanna on account of share of income..... 50 00
For support of family, payable out of net income..... 300 00
Oct. 27, 1890, by amount advanced to C. B. Hanna income. 150 00
Nov. 18, 1890, by amount advanced C. B. Hanna on account of net income..... 93 00
Dec. 6, 1890, paid H. L. Hanna for the support of the family of C. B. Hanna, payable out of the net income..... 50 00
Dec. 11, 1890, by amount paid C. B. Hanna on account of income..... 75 00
Dec. 31, 1890, by amount advanced H. L. Hanna for support of family of C. B. Hanna, payable out of the net income..... 300 00
March 3, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
April 1, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
April 30, 1891, by amount advanced C. B. Hanna share of income..... 50 00
June 2, 1891, by amount advanced C. B. Hanna share of income..... 50 00
June 30, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
August 14, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
Sept. 14, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
Sept. 30, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
Oct. 30, 1891, by amount advanced C. B. Hanna on account of income..... 50 00
Nov. 2, 1891, by amount advanced H. L. Hanna on account of income..... 100 00

Testimony of H. G. Oliphant.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. Raynolds
vs.
Cassius B. Hanna.

108 Testimony taken before Irvin Belford, special master, in the above-entitled case in the hearing at the clerk's office in the city of Cleveland, on Thursday, November 12, 1891.

Present on behalf of complainant, J. Wm. Ball.
" " " " defendant, Moses R. Dickey.

H. G. Oliphant, a witness called on behalf of complainant, being sworn, testified as follows:

Statement of Moneys Advanced to C. B. Hanna.

June 3, 1882. Cash paid to C. B. Hanna, for services in attendance on Robert Hanna	$300	00
Cash paid to C. B. Hanna, repairs, funeral expenses, etc	71	64
Aug. 1, 1882. Amount paid to C. B. Hanna, and disbursed as follows:		
Hattie Whitaker, board	10	00
Mary Whitaker, board	10	00
Expense	1	65
Amount to Friendly inn	3	00
Total	$	
Oct. 2, 1882. Paid to C. B. Hanna, on account of Hattie Whitaker, sundry items:		
Book account	101	33
Six weeks' board	30	00
Total	$131	33
Oct. 2, 1882. Amount paid to C. B. Hanna, account of Mary Whitaker, book account	38	06
Board	21	80
Total	$59	86
Oct. 2, 1882. Amount paid *paid* to C. B. Hanna on account of Robert Whitaker, book account	$21	22
Board	21	80
Total	$43	02
Oct. 2, 1882. By amount paid to C. B. Hanna, for services of John Mitch, Prospect street	80	00

Dec. 30, 1882. By amount paid C. B. and H. L. Hanna, on account of advances for quarter ending Dec. 31, 1882, on account of personal expense and board of Hattie Whitaker	110 17
Mary Whitaker	107 08
Robert Whitaker	74 05
Dec. 30, 1882. By amount paid C. B. and H. L. Hanna, advances on account of estate of Robert Hanna, deceased	69 25
Mar. 31, 1883. By amount paid C. B. and H. L. Hanna, on account of Mary Whitaker, book account	52 12
Board	32 50
Total	84 61
Robert Whitaker, book account	62 25
Board	32 50
Total	$94 75
Hattie Whitaker, book account	$83 31
Total	$83 31
John Mitch, wages	$40 00
May 3, 1883. Amount paid H. L. Hanna; expense to Canandaigua and Rochester, on account of Hattie Whitaker	42 88
Amount paid C. B. Hanna on account of following:	
Hattie book account	149 57
Board	7 50
Total	$157 07
Mary Whitaker, book account	$86 82
Board	65 00
Total	$151 82
109 June 30, 1883. Amount paid to C. B. Hanna on following account:	
Robert Whitaker, book account	$49 35
Boarding	65 00
Total	$114 35
John Mitch and others, wages, etc	$102 92
Sept. 30, 1883. Amount paid to C. P. Hanna, account of cash realized on sale of old family carriage	$75 00
Sept. 30, 1883. Amount paid C. B. Hanna, on account of Hattie Whitaker:	
Board	$65 00
Book account	115 87
Total	$180 87

Sept. 30, 1883. Amount paid C. B. Hanna, on account of Mary Whitaker, boarding	$65 00
Book account	53 60
Total	$118 60
Sept. 30, 1883. Amount paid C. B. Hanna, on account of Robert Whitaker:	
Board	$65 00
Book account	38 63
Total	$103 63
Dec. 31, 1883. Amount paid C. B. Hanna, on account of wages paid to John Mitch	$40 00
Dec. 31, 1883. Amount paid C. B. Hanna, on account of Hattie Whitaker:	
Board	$65 00
Book account	141 00
Total	$206 00
Dec. 31, 1883. Amount paid to C. B. Hanna, on account of Mary Whitaker:	
Board	$65 00
Book account	102 53
Total	$167 53
Dec. 31, 1883. Amount paid to C. B. Hanna, on account of Robert Whitaker:	
Board	$65 00
Book account	48 21
Total	$113 21
March 29, 1884. By account paid C. B. Hanna and wife, on account of Hattie Whitaker: Board	$65 00
Book account	73 33
Total	$138 33
March 29, 1884. Amount paid C. B. Hanna and wife, on account of Mary Whitaker: Board	$65 00
Book account	70 55
Total	$135 55
Mar. 29, 1884. Amount paid C. B. Hanna and wife, on account of Robert Whitaker: Board	$65 00
Book account	48 78
Total	$113 78

May 9, 1884. By amount paid C. B. Hanna and wife on account, as follows:		
Hattie Whitaker, in part payment on board and expenses, per quarter ending June 30		$50 00
Mary Whitaker, per quarter ending June 30		50 00
Robert Whitaker, per quarter ending June 30		50 00
John Mitch, wages		57 55
June 30, 1884. Amount paid C. B. Hanna and wife on account, as follows:		
Board		65 00
Balance book account		53 95
Mary Whitaker, board		65 00
Balance book account		28 65
Total of Hattie Whitaker	$118 95	
Total of Mary Whitaker	93 65	
Robert Whitaker, board		65 00
Balance of book account		2 58
Total		$67 58
110 June 30, 1884. Amount paid C. B. Hanna, on account of John Mitch, wages		$80 00
June 30, 1884. Amount paid C. B. Hanna, on account of bill of Joseph Carter for labor		45 75
Sept. 30, 1884. Amount paid C. B. Hanna and wife on account of following:		
Hattie Whitaker, board		65 00
Book account		65 30
Total		$130 30
Robert Whitaker, board		$65 00
Book account		70 04
Total		$135 04
Robert Whitaker, board		$65 00
Book account		48 11
Total		$113 11
Dec. 5, 1884. By amount paid C. B. Hanna and wife advanced on account of board and expenses, per quarter ending Dec. 31, 1884:		
Hattie Whitaker		$50 00
Mary Whitaker		50 00
Robert Whitaker		50 00
Dec. 30, 1884. Amount paid C. B. Hanna and wife on account of following:		
Hattie Whitaker, book account		88 86
Board		65 00
Total		$153 86

Less amount	50 00
	$103 86
Mary Whitaker, book account	$85 26
Board	65 00
Total	$150 26
Less amount paid	50 00
	$100 26
Robert Whitaker, book account	$51 88
Board	65 00
Total	$116 88
Less amount	50 00
	$66 88
Dec. 30, 1884. Amount paid C. B. Hanna and wife for cash advanced in paying for moving etc.	$96 95
Jan. 20, 1885. Amount paid C. B. Hanna on account of board, Hattie Whitaker	$50 00
Mary Whitaker, board	50 00
Robert Whitaker, board	50 00
March 31, 1885. Amount paid C. B. Hanna on account, as follows:	
Hattie Whitaker, board	$65 00
Book account	78 43
Total	$143 43
Less amount advanced	50 00
	$93 43
Mary Whitaker, board	$65 00
Book account	59 20
Total	$124 20
Less amount advanced	50 00
	$74 20
Robert Whitaker, board	$65 00
Book account	45 78
Total	$110 78
Less amount advanced	50 00
	$60 78
April 16, 1885. Amount paid C. B. Hanna, on account of labor performed by various persons at Prospect street	$27 75

111 May 6, 1885. Amount paid C. B. Hanna and wife on account of boarding, etc.:

Hattie Whitaker	$50 00
Mary Whitaker	50 00
Robert Whitaker	50 00

June 30, 1885. Amount paid C. B. Hanna, as follows:

Hattie Whitaker, book account	$117 68
Board	65 00
Less amount paid	50 00
	$132 68
Mary Whitaker, book account	$98 48
Board	65 00
Less amount already paid	50 00
	$113 48
Robert Whitaker, book account	$34 31
Board	65 00
Less amount paid	50 00
	$48 31
For cutting grass at homestead, and other work	$8 00

July 22, 1885. Amount paid Harriet L. Hanna, as advanced board and expense of Robert Whitaker $35 00

August 3, 1885. Amount paid C. B. Hanna on following account:

Harriet Whitaker, board and expense	$50 00
Mary Whitaker, board and expense	50 00
Robert Whitaker, board and expense	50 00

Sept. 30, 1885. Amount paid C. B. Hanna and wife on account of following:

Hattie Whitaker, board	65 00
Book account	43 39
Less amount already paid	50 00
	$58 39
Mary Whitaker, board	$65 00
Book account	45 95
Less amount paid	50 00
	$119 34

Sept. 30, 1885. Amount paid C. B. Hanna and wife on account of following:

Robert Whitaker, board	$65 00
Book account	43 94
Less amount paid	85 00
	$23 94

Oct. 5, 1885. Amount paid C. B. Hanna and wife on note due in four months	$200 00
Nov. 20, 1885. C. B. Hanna and wife on account of following:	
Hattie Whitaker, board, etc	50 00
Mary Whitaker, account of board, etc	50 00
Robert Whitaker, account of board	50 00
Dec. 1, 1885. Amount advanced C. B. Hanna and wife on note bearing date Dec. 1, 1885, due in six months with interest at six per cent	500 00
Dec. 31, 1885. Amount paid C. B. Hanna and wife on account of following:	
Hattie Whitaker, book account	103 36
Board	65 00
Amount paid	50 00
	$118 36
Mary Whitaker, book account	45 60
Board	65 00
Amount paid	50 00
	$60 60
Robert Whitaker, book account	$51 31
Board	65 00
Amount paid	50 00
	$66 31
Jan. 21, 1886. Amount loaned C. B. Hanna and wife on note dated this day and due in sixty days at six per cent	$150 00
112 Feb. 2, 1886. Amount paid C. B. Hanna and wife on account of board:	
Hattie Whitaker	50 00
Mary Whitaker	50 00
Robert Whitaker	50 00
Mar. 31, 1886. Amount paid C. B. Hanna and wife on following accounts:	
Hattie Whitaker book account	65 50
Board	65 00
Less amount —	50 00
	$80 50
Mary Whitaker, book account	$40 79
Board	65 00
Less amount paid	50 00
	$55 79

Robert Whitaker book account	$36 80
Board	65 00
Less amount paid	50 00
	$51 80
April, 1886. Amount paid to C. B. Hanna and wife on note dated April 5, 1886, due in ninety days, six per cent	150 00
May 3, 1886, amount advanced H. L. Hanna as follows:	
Hattie Whitaker, board	$50 00
Mary " "	50 00
Robert " "	50 00
June 9, 1886. Amount paid H. L. Hanna on note of herself	250 00
June 30, 1886. Amount paid to C. B. Hanna and wife on account as follows:	
Harriet Whitaker	$107 32
Board	65 00
Less amount paid	50 00
	$122 32
Mary Whitaker, book account	95 09
Board	65 00
Less amount paid	50 00
Total	$110 09
Robert Whitaker, book account	$40 66
Board	65 00
Less amount paid	50 00
	$55 68
July 23, 1886. Amount paid C. B. Hanna on account of following:	
Hattie Whitaker, board and book account	50 00
Mary " book account	50 00
Robert " "	50 00
August 27, 1886. Amount paid H. L. Hanna represented in note given for $300.00, dated August 27, 1886	150 00
September 30, 1886. Amount paid C. B. Hanna and H. L. Hanna on account of payments as follows:	
Harriet Whitaker, board	65 00
Book account	97 13
Less amount paid	50 00
	$112 13
Mary Whitaker, board	65 00
Book account	75 89
Less amount paid	50 00
	$90 89

Robert Whitaker, board	65 00
Book account	32 66
Less amount —	50 00
	$47 66

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Sept. 30, 1886. Amount paid H. L. Hanna for grading	$10 00
Nov. 2, 1886. Amount paid C. B. and H. L. Hanna on account of Harriet Whitaker, board, amount advanced	50 00
Mary Whitaker, same	50 00
Robert Whitaker, same	50 00
Dec. 7, 1886. Amount paid H. L. Hanna on note of herself and husband, six per cent. interest	150 00
Dec. 13, 1886. Amount paid H. L. Hanna, on account of board and book account for quarter:	
Hattie Whitaker	50 00
Mary Whitaker	50 00
Robert Whitaker	50 00
Dec. 31, 1886. Amount paid C. B. Hanna and wife as follows:	
Hattie Whitaker, board	65 00
Book account	122 37
Less amount paid	100 00
	$87 37
Mary Whitaker, board	$65 00
Book account	89 84
Less amount paid	100 00
	$54 84
Robert Whitaker, board	$65 00
Book account	48 35
Less amount paid	100 00
	$13 35
Jan. 31, 1887. Amount paid C. B. Hanna and wife as advances on account:	
Hattie Whitaker, board	50 00
Mary Whitaker, board	50 00
Robert Whitaker, board	50 00
Mar. 1, 1887. Amount paid H. L. Hanna on note of herself and husband, dated March 1, 1887	50 00
Mar. 10, 1887. Amount paid H. L. Hanna on note of herself and husband, dated Mar. 10, 1887	100 00
Mar. 31, 1887. Amount paid H. L. and C. B. Hanna, on account of Hattie Whitaker, board	65 00
Book account	77 45
Less payment	50 00
	$92 45

Mary Whitaker, board	$65 00
Book account	89 28
Less payment	50 00
	$104 28
Robert Whitaker, board	$65 00
Book account	43 27
Less payment	50 00
	$58 27
June 30, 1887. Paid C. B. Hanna and H. L. Hanna on account of board and book account, etc.:	
Robert Whitaker	174 31
August 23, 1887. Amount paid H. L. Hanna, note of herself and husband, dated August 27, 1887	$100 00
August 23, 1887. Amount paid H. L. Hanna for work about Euclid-avenue house	67 75
Sept. 30, 1887. Paid H. L. Hanna board of Hattie Whitaker	65 00
Sept. 30, 1887. Paid H. L. Hanna board of Mary Whitaker	65 00
Sept. 30, 1887. Board and book account of Robert Whitaker	143 32
Dec. 31, 1887. Amount paid H. L. Hanna:	
Board of Hattie Whitaker	$65 00
Mary, board	65 00
Board and book account of Robert Whitaker	126 16
March 31, 1888. Amount advanced to H. L. Hanna:	
For board of Hattie Whitaker	65 00
Board, Mary	65 00
Robert Whitaker, board and book account	69 48
May 5, 1888. Amount paid H. L. Hanna to pay sundry bills	49 25
May 5, 1888. Amount paid H. L. Hanna to purchase property for Robert's room, etc	150 00
114 July 1, 1888. Amount paid H. L. Hanna for boarding Hattie	65 00
Boarding Mary	65 00
Boarding Robert	65 00
Robert's book account	74 87
Sept. 29, 1888. Amount paid H. L. Hanna for boarding Hattie	65 00
Mary	65 00
Robert's book account	84 95
Boarding Robert	65 00
Dec. 31, 1888. Advanced H. L. Hanna to pay expenses	53 40
Dec. 31, 1888. Amount advanced H. L. Hanna to board Hattie	65 00
Boarding Mary	65 00
Book account of Robert	71 90

116 Q. Give the exact amount if you have it.
A. $10,486.04.

Q. Was that money paid out of the principal or income of the estate, do you know, from your books?

A. The books show that the money was paid out of the principal of the estate.

Q. On what page?

A. On various pages, as it was charged.

Q. What, if any rent, has C. B. Hanna ever paid for these premises, or has there been any charged to him in the books?

A. No; the books do not show that any one has been charged.

Q. Or paid?

A. Or paid for the property.

Q. Do you know who has lived in that house ever since it has been constructed?

A. No; I don't know only from hearsay.

Q. In the year that the dividend of forty-two and one-half shares par value stock was made by the Union Steel Screw Company, what appears to have been credited to income account on the books as you have them before you?

A. That appears on page 145 of the ledger, and page 22 of the journal.

By the MASTER:

Q. What was the income account paid that year to C. B. Hanna?

A. $3,701.62.

Q. Can you show what that was made up of?

A. I can show what the income account was made up of for that year.

Q. Do so.

A. That is the gross income.

Q. Then this 4,250 was in lieu of that, and was embraced in that income account as appears by the books?

117 A. Yes, sir.

By Mr. WING:

Q. In the dividend account the 4,250 shares is charged and credited, is it not?

A. Yes, sir.

Q. And in the income account as it appears on page 145 of the ledger and on page 22 of the journal, the 4,250 is also both charged and credited?

A. Yes, sir.

Q. If that is true, do or do not such entries show that the principal or bulk of the estate, as distinguished from the income of the estate, was never charged with 4,250, and was not affected by such entries?

A. I can't say that it would.

Testimony of Fayette Brown.

WEDNESDAY, *September* 29, 1891.

Hearing resumed, pursuant to adjournment.

FAYETTE BROWN, called on behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. Please state your name, age, occupation, and place of residence, Mr. Brown.

A. Fayette Brown; I am superintendent of the Union Steel Screw Company, and have been for a number of years, since before 1882.

Q. And your age?

A. Oh, sixty-five or sixty-six; I am sixty-five now.

Q. You reside in Cleveland?

A. Yes, sir.

Q. Now, the memorandum that you have handed me, and which the stenographer has marked Exhibit "A," is a correct state-
118 ment of the stock in the name of Robert Hanna at the time of his death, and still belonging to the estate of Robert Hanna, is it not?

A. Yes, sir.

Q. Will you please state what, in your opinion, the market value of that stock was in 1882; just your opinion with reference to it.

A. There was a block of stock sold sometime after 1882, within a year or two, I don't know the exact date; it had been pledged as collateral with some bank and was sold, and I understood it was sold for $110.00 a share; that was what I was told.

Q. What, in your opinion, is the value of the stock at the present time? If you had any, what would you want to sell it for, and be willing to pay?

A. It is difficult to fix the value of it for this reason, owing to the uncertainty of the business. If the business could keep profitable as it has been for three or four years, it would easily be worth one price, whereas the business might change within a few months, so it would put an entirely different face on the matter, and a price a man would fix would depend upon his opinion of what the immediate future was going to bring.

Q. Please state what you think the price would be, based upon that opinion.

A. I can hardly do that; I could not give the figures. Some stock was offered on this market a few months ago at 170. I declined to buy at that price. The stock was afterwards sold, but at what price I don't know.

Q. Do you know to whom it was sold?

A. It was sold, I think, to Charles A. Otis. I don't know what he paid for it.

Q. And the par value of the stock is the same?

A. $100—yes, sir; and the company has some surplus.

Q. How much?

A. I don't now recollect what it is, probably fifteen or
119 twenty per cent.; probably about fifteen per cent.; I am in doubt about that. Any price above that is based upon its possible earnings.

Q. Well, the prospects of the business of the company, as far as you know, are as favorable as they have been for some time, are they not?

A. No, sir; I do not think they are. I do not think the earnings of the company are likely to be so large as they have been.

Q. Upon what do you base your opinion as to the probable decline in the business?

A. The competition from the establishment of new manufactories, and the building of additional machinery when there is already more than twice the machinery that is needed in the country.

Q. At the present time, however, it is running prosperously, is it not?

A. Be*ing* doing very well—yes, sir; the business has been prosperous.

CLEVELAND, *September* 28, 1891.

Referring to the books and records of the Union Steel Screw Company, I find that in April, 1882, 170 shares of the capital stock stood registered in the name of Robert Hanna, of Cleveland, Ohio. The par value of these shares was $100 per share.

In January, 1883, a stock dividend was made, of which forty-two and one-half shares went to the name of Robert Hanna.

In February, 1883, one-half share was tranferred to some other party, leaving 212 shares standing in the name of Robert Hanna, and there has been no change since then.

120 Cash dividends have been paid on the stock of Robert Hanna since April, 1882, as follows:

In 1882	$3,400
In 1883	5,938
In 1884	3,180
In 1885	1,696
In 1886	1,696
In 1887	2,544
In 1888	4,028
In 1889	4,028
In 1890	5,936
In 1891. To date	2,544
Total	$34,990

I do not know what was the market value of the stock in 1882. There has been so few transfers, that it can hardly be said to have any established market value. I have no personal knowledge of the price at which any stock has been sold during the past ten years.

FAYETTE BROWN.

Fayette Brown, Recalled.

JANUARY 22, 1892.

On examination before Irvin Belford, master, there were present J. William Ball, counsel for complainant, and Moses R. Dickey, counsel for defendant.

FAYETTE BROWN, recalled for further examination, testified as follows:

By the MASTER:

Q. Mr. Brown, you have with you the records of the Union Steel Company containing the proceedings of the company relative to the issue of forty-two and one-half shares of stock dividend to the estate of Robert Hanna? Will you give me the date of that transaction?

A. This was done at the annual meeting of the stockholders, held January 18, 1888. Among other resolutions adopted was the following:

"Mr. Leland submitted a motion that the directors be au-
121 thorized and directed to declare a divided of fifty per cent., payable in the stock of the company to stockholders, of record January 18, 1883."

"On motion of Mr. Payne, same was amended to read twenty-five per cent., instead of fifty per cent., and Mr. Leland's motion, as amended, was declared by the chairman to be duly adopted."

Q. How many of the stockholders were present at that meeting?

A. The record does not state the number that were present, but ballots were cast in election of directors for 2,265 shares.

Q. How many shares were owned by the stockholders at that time?

A. There were 4,340 shares.

Q. What notice, if any, had been given to the stockholders of the proposed issue of stock dividends?

A. None.

Q. What was the capital stock authorized by your charter?

A. $1,000,000.

Q. What was the paid capital prior to the time this twenty-five per cent. dividend was declared?

A. $434,000.

Q. How were these shares of stock dividend paid for?

A. They were paid for out of the surplus earnings.

Q. In what way had this surplus been employed before this dividend was declared?

A. It had been used in the business, really as working capital.

Q. Part of the working capital?

A. Yes, sir; gradually accumulating.

Q. It had been used, then, as a part of the working capital, just as the original paid-up stock fund had been used?

122 A. Well, it was used the same as all funds that we had, and had accumulated on hand, and it was thought best to make it into permanent capital.

By Judge DICKEY:

Q. Did your assets is excess of your liabilities at this time equal the amount of capital stock authorized by your charter of incorporation?

A. No, sir.

Q. Had the authorized capital stock ever been subscribed or paid—the whole amount?

A. No, sir; never been subscribed or paid.

Q. You speak of this dividend of stock having been paid by the surplus. Was there any other payment than simply issuing capital stock that had never been subscribed to the stockholders, in connection with this dividend?

A. No; there was no payment made.

Q. Then, if I understand you correctly, your assets in excess of your liabilities did exceed, at the time this dividend was made, the amount of capital stock subscribed and paid in?

A. It did; yes, sir.

Q. And your assets in excess of your liabilities exceeded the amount of capital stock subscribed and paid, in an amount equal to the capital stock to be divided among the stockholders by this dividend?

A. Yes; it more than equaled it.

Q. No notice, if I understand you correctly, was given to the stockholders prior to this meeting, that any increase of stock would be made or that any stock dividend would be made at this meeting?

A. Not that I know of.

By Mr. BALL:

Q. There was a notice, was there not, Mr. Brown, given *that* the stockholders' meeting at which this stock dividend was declared?

123 A. I think there was.

Q. Then explain that, so that we will have it on record.

A. I think a notice was sent, as usual, to all stockholders, that the annual meeting would occur.

Q. And how long before?

A. Generally about two weeks, I think.

Q. Did this stock dividend represent anything more or less than earned profits that had been earned and undivided on that stock?

Objection by counsel for defendant.

A. Nothing else except that.

By the MASTER:

Q. Was it customary, and is it within the scope of authority of this corporation, to carry this surplus an indefinite time?

Objection by counsel for defendant.

A. Nothing in the by-laws, or in the laws, to prevent their carrying as large a surplus as they please.

Q. You will state whether, in declaring this dividend, it was the purpose of the corporation to carry this portion of your earnings to the capital account, and so turn it into the capital, or whether it was in the nature of a cash dividend?

A. Well, it was in the nature of a dividend, but the effect of it was to convert the surplus into a permanent capital that could not be divided afterwards, and we were using this money, of course, in the business, and when it was converted into capital it stayed in the business. If we had divided all of our surplus, then we should have no surplus at all, and should have had that much more capital stock.

Objection by counsel for defendant.

Q. When were the certificates of this stock dividend delivered?

A. Well, I cannot answer that exactly, but it was de-
124 livered very shortly afterwards. Our books, of course, would show when each one was mailed and delivered, and I presume we have receipts; but I don't know about that.

Q. How long had the Steel Screw Company been in active operation?

A. The charter of the corporation was taken out in 1871, and I think it took about two years to get the works in operation after that—probably about 1873 or 1874, I think.

Q. Was this the first increase of the stock made?

A. I think they called the stock in as they found in building they needed more. This is the first and only stock dividend. All previous increases had been paid for by the stockholders by subscription.

FAYETTE BROWN.

Testimony of Henry C. Ellison.

Office of the clerk of the United States circuit court for the northern district of Ohio.

WEDNESDAY, *October* 7, 1891.

Hearing resumed pursuant to adjournment.

HENRY C. ELLISON, called on behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. Please state your name, age, occupation and place of residence.

A. Henry C. Ellison, forty-nine years; reside in Cleveland; cashier of the State National bank.

Q. How long have you been cashier of the State National bank?

A. Since its organization, January 2, 1889. Prior to that, of the Ohio National bank, since January, 1882.

Q. I will ask you if you were acquainted with Robert Hanna in his lifetime.

A. Yes, sir.

125 Q. Please state what, if any, stock he had in the Ohio National bank, the amount, in April, 1882?

A. Well, by a reference to the books, I learned that in April, 1882, Robert Hanna held 231 shares of the stock of the Ohio National bank.

Q. What was the value of the shares?

A. Of the par value of $100 and he held that, and Mr. Brooks, his executor, held it until the bank went into liquidation January 2, 1889.

Q. Please state what the market value of the stock was at that time?

A. In April, 1882, the market value was about 1.25—that is, 1.25 for each $100 share.

Q. Now please state what dividends were paid on that stock during the time it was held by the estate of Robert Hanna, the dates and amounts, and state fully in reference to it.

A. Well, there were dividends paid on the stock every six months, May and November, beginning on the first day of May, 1882, and ending with the first day of November, 1888, which was the last dividend on the stock paid, amounting to $11,319. I have them in detail.

Q. Please give them in detail.

A. May 1, 1882, $924; November 1, 1882, $924; May 1, 1883, $924; November 1, 1883, $924; May 1, 1884, $924; November 1, 1884, $924; May 1, 1885, $924; November 1, 1885, $693, and each May and November from that time on $693, to and including November 1, 1888.

Q. Please state what the value of the stock was at the time it was cancelled or redeemed, at the time the next organization went into existence.

A. The par value was paid back to all the stockholders in cash. $23,100 paid to Mr. Brooks, the par value of the stock, in addition to the $11,000 that had been paid prior to that. The balance

126 is still unpaid, and consists of pieces of real estate one place and another, and it will yet pay, in my opinion, somewhere from ten to fifteen per cent.

Q. Well, that includes all the surplus that was in the bank?

A. Yes, sir.

Q. And in any way connected with the stock?

A. Yes, sir.

Q. Has there ever been any division of the surplus?

A. No, sir.

Q. Is there now any cash surplus of the old Ohio National bank on hand?

A. There is no cash surplus. They have a cash balance with the State National bank of some five thousand and odd dollars.

Q. Now, what, if any, other property of value did Mr. Hanna have in the Ohio National bank, or has he in the State National bank on deposit there, special or otherwise?

A. None to my knowledge. Mr. Brooks, as executor, had a private box there with his name on it that he had all his own papers in, but I never knew its contents. That box has been taken away and this stock is the only thing I ever knew anything about.

Q. Mr. Brooks had a private box with his name you say. You mean Robert Hanna's name?

A. Yes, sir; it was J. T. Brooks, executor, Robert Hanna.

Q. And that was, you say, taken away?

A. Yes, sir; that was shipped to him to Pittsburgh some years ago.

Q. Was there, at any time, any silverware or jewels or anything of that kind that you knew of there?

A. I never knew of any.

Q. Do you know anything of the value of real estate here in Cleveland?

A. Not a great deal. I would not be competent to judge as to the value of real estate.

127 *Testimony of J. D. Cleveland.*

2 O'CLOCK P. M.

J. D. CLEVELAND, called on behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. Please state your name, age, occupation, and place of residence.

A. J. D. Cleveland, sixty-nine years, lawyer; live at 667 Prospect street, in this city.

Q. I will ask you if you are familiar with the property owned and occupied as a homestead by Robert Hanna in his lifetime on Prospect street?

A. Yes, sir.

Q. I will ask you if you are familiar with the value of real estate in that vicinity?

A. Yes, sir; I think I am.

Q. From your own knowledge of the value of real estate in that vicinity, what would (you) say that was worth in April, 1882, about the time of Robert Hanna's death?

Objected to.

A. Between thirty and forty thousand dollars.

Q. I will ask you if you are familiar with the value of real estate in the neighborhood of the corner of Superior and Erie streets in the city of Cleveland?

A. Tolerably well acquainted with it.

Q. What was the value of the property formerly owned by Ed. Cowles, and now owned by the Robert Hanna estate, say in Novem-

ber, 1889, being sixty-four feet front on Superior street, including the improvements?

A. Well, I tried to ascertain, with a reasonable degree of accuracy, the value of that property by inquiry as to sales in that neighborhood. I cannot be very definite about the value there, but the result of my inquiry was that the property was worth between
128 fifty and sixty thousand dollars. It is on the corner, eligible for building and for lighting every part of it, and I think it is worth between eight hundred and a thousand dollars per foot front on Superior street.

Q. What would you say the improvements are worth?

A. The improvements are worth only so much as to enable the owner to pay his taxes—a very small percentage. They were not valuable enough to give value to the land. They enable him, however, to pay his taxes, and were worth something to him.

Q. On that basis what would (you) say the improvements were worth?

A. They would not add to the value of the land more than a couple of thousand dollars.

Q. Now, what do you say the property is worth at this time, supposing it is rented for $1,200 a year?

Objected to.

A. There has been a very steady appreciation of value in that neighborhood, especially on Erie street. I think it had not, however, increased above those figures—above the maximum that I stated. That is all I can say about it. I am not aware of any recent sales on Superior street.

Q. I will ask you if you are familiar with the value of real estate on Euclid avenue out at 1755, where C. B. Hanna lives, next to the stone church, supposing the lot to be 107 feet front and 300 feet deep, and upon the lot a house that cost five or six years ago, to build, $10,500. What would you say that property would be worth at this time?

Objected to.

A. In my opinion land there is worth, at that depth, in good neighborhood, $150 a foot front, but I cannot give any opinion about the value of the house. Houses are so different. I
129 have not seen this one at all. A house costing $10,000 might not be worth $5,000, and might be worth more.

Q. You would say that is the value at this time?

A. I believe so.

Q. Now, what would you say the value of the property was November 20, 1889?

A. There has probably been a less increase in value in that time out there. It is very evident all lands, at that end of the city, have increased in value in the last two years. The land may have increased fifteen or twenty per cent. in the last two years. I think likely it has right there.

Q. I will ask you what the value of the property was, in your opinion, in April, 1882, between nine and ten years ago?

Objected to.

A. I am not able to say from any knowledge I had of it at that time. My knowledge has altogether been acquired within two or three years by valuations for loans at the Society for Savings, where we made particular inquiry about it, or had cause to. That I had no knowledge of in 1882.

Q. Well, from your general knowledge of the value of real estate, here in the city, having more or less to do with lands, in connection with the Society for Savings, would you say it was of greater or less value in 1882 than at the present time?

A. It was of less value then, for obvious reasons. The increase of population in the neighborhood has been very large, and the facilities for transportation, which now exist, have brought it very much nearer the city.

Q. Could you state what your knowledge of the increase made in that section of the city, in the way of travel, and also the increase of population, as to what, in your opinion, would be the difference in the valuation at that time and this?

130 Objected to.

A. I am not sufficiently familiar with that.

Q. Your opinion, based on the improvements that have taken place?

A. I think it has increased in value, but, not knowing what it was worth then, I cannot tell you what the difference is.

Q. Suppose there is located on that lot, 107 feet front on Euclid avenue, by 300 feet deep, a house constructed by Mr. Brooks, the executor of the Hanna estate, of about twelve rooms, with closets, halls, etc., what would you say that property ought to rent for as a residence at this time?

A. I am not familiar with rents in that part of the city. I cannot give you any opinion about rentals there. Rentals are based upon demands, and not upon value.

Cross-examination of J. D. CLEVELAND.

By Judge DICKEY:

Q. Did you have any knowledge of the time when Mr. Brooks made the exchange of the Prospect-street property, to which you have been referred, for the property on the corner of Superior and Erie, and did you have any communication with him upon the subject of the propriety of making such an exchange?

A. I knew that negotiations were had between him and Mr. Cowles for exchanging the property. I had conversations and communications with Mr. Brooks before it took place, and I heard it had taken place.

Q. Please state, as near as you can recollect, what you said to him upon the subject of the advisability of making such an exchange?

A. I cannot recollect accurately, but the substance of it was, that he would make no mistake in exchanging it at a value of a dif-
131 ference of $20,000 or $25,000, that being about what my estimate of the difference was or that of my associates and acquaintances.

By the REFEREE:

Q. Did you put your opinion as to the value of the property in writing?

A. Yes, sir; I did.

Q. And send it to Mr. Brooks?

A. Yes, sir.

At this point the attorney for the plaintiff offered in evidence the report of T. S. Marsh, referee in the case of F. A. Raynolds, assignee, against C. B. Hanna, No. 3363, in common pleas court, which was filed in that court May 9, 1887, for the purpose of proving the ownership and occupation of the real estate in the city of Cleveland, occupied by Cassius B. Hanna and his wife as a home, and also the ages of the children, and also in reference to the disposition of the income of the estate from time to time, as given in the testimony, subject to objections by the defendants as to its competency.

Testimony of V. C. Taylor.

October 9th, hearing resumed.

V. C. TAYLOR, called on behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. State your name, age, residence and occupation.

A. V. C. Taylor, age fifth-three; Cleveland; real-estate dealer.

Q. How long have you been in the real-estate business?

A. Twenty-one years.

Q. Are you familiar with the value of property in the neighborhood of Erie and Superior streets?

A. Yes, sir.

132 Q. What is the value, at the present time, of the property formerly occupied by Edwin Cowles, on the corner of Erie and Superior streets?

A. Well, I should put it $1,000 a foot for the land, including improvements.

Q. What would you say the same property was worth on the twentieth of November, 1889?

A. Oh, probably $50,000.

Q. Were you familiar with the property occupied by Robert Hanna as a homestead, on Prospect street, in his lifetime?

A. Yes, sir; I was.

Q. What would you say that property was worth in April, 1882?

Objected to.

A. You mean the whole piece, clear through?

Q. Yes, sir.

A. $40,000, I should think.

Q. Were you familiar with the property occupied by C. B. Hanna at this time with his family, 1753 Euclid?

A. Yes, sir; 107 feet by 360.

Q. What would you say the value of that property is at this time with the improvements on it, the house costing five years ago $10,500?

A. I should say in the neighborhood of $20,000.

Q. What would you say that property was worth in 1882, with the improvements that were then on it, a little old cottage?

A. I don't know as I can recollect what the values were at that time; I would have to look at my books to get at the values at that time, before I could give an intelligent opinion. I should think probably $140 a foot for it, possibly, for the whole thing.

Q. I will ask you what the rental value of that property is at this time, improved as it is, a house of twelve rooms, closets, etc.?

133 A. $900 to $1,000 a year.

Q. What was the rental value of the property, November 20, 1889?

A. About the same. Very little change in rentals. If anything, it is a little less now than it was then; but there is very little change.

Q. Further back, five or six years, with the same house on it, what would you say?

A. No change; I don't think there is any great change in rentals.

Q. What would you say the rental value of it was with the old improvements on it, a little white cottage?

A. I don't know. It would be a hard matter to tell; possibly $30 a month.

Cross-examination of V. C. TAYLOR.

By Judge DICKEY:

Q. Have you any personal knowledge as to the frontage and depth of the property, you have mentioned on Superior street, and on Prospect street?

A. My impression is that the Superior-street property is about sixty-five feet by 105. I think the Prospect-street property was 100 by 410 to Sibley street, if my memory serves right. On Euclid avenue it is 107 by 306.

Q. Do you recollect the circumstance of Mr. Brooks exchanging the Prospect property for the property on the corner of Superior and Erie?

A. Yes, sir.

Q. About the time he made that exchange of properties, did he advise with you, in regard to the propriety, of making the exchange, on the terms on which it was made?

A. He did; yes, sir.

Q. At the time the exchange was made, what would you estimate the value of the Prospect-street property at?

A. Well, I should say $30,000. Prospect-street property declined like fury there for a few years.

134 Q. At that date what was the estimated value of the property on the corner of Superior and Erie streets?

A. $50,000.

Q. What advice, if any, did you give Mr. Brooks as to making the exchange upon the terms at which he made it with Mr. Cowles?

A. I think I told him to go ahead and do it. I think I gave him that advice. He came to my house some time about the Fourth of July, and wanted to know what he had better do. I told him I thought it was a good deal for him, and told him to go ahead.

Q. You gave him a letter or paper giving your opinion as to the propriety of making the exchange, did you not?

A. I think I did. I don't recollect, but I think I did.

Q. How long had you been familiar with these properties before the exchange was made?

A. Oh, I have known them for twenty years.

Q. Were either of them, at any time, in your hands as a real-estate agent?

A. The Prospect-street property was; yes, sir.

Q. For how long?

A. I don't recollect now. Some time.

Q. A year or so?

A. Yes, sir; probably two or three years. I had my sign on it no less than a year and a half or two years.

By Mr. BALL:

Q. You remember about the time the house was constructed on the lot at 1753 Euclid avenue?

A. I should think it was in the neighborhood of six or seven years ago.

Q. Do you know who has occupied those premises since their construction?

A. Why, I think Mrs. Hanna and Arrial's children—Mrs. Whitaker's children—as a home.

135 By Judge DICKEY:

Q. Do you know of Mr. C. B. Hanna being in the city of Cleveland at all to make this his home within the three years last past?

A. I don't think he has.

By Mr. BALL:

Q. He might have been there at his home without your knowing it, I suppose?

Hearing was thereupon adjourned until Tuesday, October 13th, 2 p. m.

TUESDAY, *October* 13, 1891—2 p. m.

Hearing resumed pursuant to adjournment.

V. C. TAYLOR, called upon behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. I will ask you, Mr. Taylor, what in your opinion the rental value of the property owned by the Hanna estate is, at the corner of Erie and Superior streets, formerly owned by Ed. Cowles?

A. I should say in the neighborhood of $100 per month.

Q. And what would you say it has been for the last two years; since November 20, 1889?

A. I shouldn't think there was much difference; a little less perhaps, because they have improved the rear part fronting on Erie street. There is not much difference—probably a little less than that.

Adjourned until Wednesday afternoon at 3 o'clock.

136 *Testimony of Henry D. G. Parsons.*

WEDNESDAY, *October* 14, 1891.

Hearing resumed pursuant to adjournment.

HENRY D. G. PARSONS, called on behalf of the plaintiff, being sworn, testified as follows:

By Mr. BALL:

Q. What is your business?

A. Stock broker, 222 Bank street.

Q. Your age?

A. Fifty-one.

Q. How long have you been in business?

A. About a year in it now.

Q. Are you a member of the firm of Deming & Company?

A. Yes.

Q. I will ask you if you are familiar with the market value of the Union Steel Screw Company's stock?

A. Yes; I have sold 120 shares of the Union Steel Screw Company's stock for $160 a share. I have also sold thirty shares at the same price.

Q. How recently?

A. That was—let me see—I sold that 120 shares somewhere about—I think it was in May; I don't make any memorandum of it.

Q. What do you say the market value of that stock is now?

A. $165. I have 150 shares for sale at that price.

Q. What would you say the value of the stock was in the market, if you know, for the last two years?

A. That I could not say.

Q. How far back have you known the market value of that stock?

A. I have known it up to the last six months, and by in-
137 quiries as to its previous value—we could not find out in our office, because we never had any of it. I think the only values we have heard of is by report.

Q. But you know it now to be worth $165?

A. I know it now to be worth $160 to $165.

Q. I will ask you how that stock stands in the city of Cleveland today?

A. I should say No. 1.

Q. Would you say there was none better?

A. None better at all.

Q. Do you know anything about the dividends it pays?

A. That I could not tell only by report.

Q. You know nothing about the surplus, or anything of that kind?

A. No, sir; nothing at all.

Q. You said you were a stock broker. I will ask you to explain more fully your business as to investments in securities, etc. You don't merely operate on margins?

A. We don't buy anything on margins. Our business is wholly with the local stocks identified with the city of Cleveland; bank stocks, manufacturing stocks, and on Lake Superior mining stocks, which are largely owned in this city.

Q. You handle stocks that are considered good investments, principally, do you not?

A. We don't handle any other but what are considered good investments.

By authority of the order of reference hereto attached on Tuesday, September 15, 1885, I was present at office of J. Wm. Ball, Esq., in rooms Nos. 19 and 20, 236 Superior street, in the city of Cleveland, and at the hour of 10 o'clock a. m., at said time and place, it then and there appearing that said C. B. Hanna was not in said Cuyahoga county, I did, on motion of said J. Wm. Hall, Esq., counsel for the plaintiff, continue the hearing of said case, and the tak-
138 ing of testimony until Tuesday, September 22, 1885, at 10 a. m. On September 22nd at said hour and place, it appearing that said Hanna was still absent from said county, I did, on motion, continue said hearing until Monday, September 28, 1885, at 10 o'clock a. m.

On Monday, September 28th, at said hour and place, it appearing that said Hanna was still absent from said county, I did, on motion, continue said hearing until Tuesday, October 6, 1885, at 10 o'clock a. m.

On Tuesday, October 6, 1885, at said time and place I did appear, and there being then and there present said C. B. Hanna and said J. Wm. Ball, counsel for plaintiff, I did, said Hanna being by me first duly sworn, according to law, take the testimony of said Hanna as follows:

Testimony of C. B. Hanna.

By J. Wm. Ball, Esq.:

1 Q. Mr. Hanna, please state your name, place of residence and occupation.

A. My name is C. B. Hanna; my age is forty; residence 1755 Euclid avenue; no occupation.

2 Q. Who owns the house in which you reside?

A. The estate of Robert Hanna, my father, deceased.

3 Q. What is the size of that lot on which the house is situated, and from whom and when was it purchased?

A. A little over 100 feet front on Euclid avenue is the front of the whole lot, and about 300 feet deep. House occupies the east side of the lot. It was bought by my father in his lifetime from the Howard estate.

4 Q. What, if any, improvements were on said lot of land at the time of your father's death?

A. A small house and barn.

5 Q. What improvements are now on said lot, and who furnished the money to construct them?

A. A new house was constructed and the old one torn
139 down; also a new barn built and the old one torn down. Mr. Middaugh was the contractor.

6 Q. Please state for whom, and for what purpose, said house and barn was constructed, and at what cost.

A. It was for a home for the family, which consisted of myself and my wife and my two children, and three children of my deceased sister. I don't know its cost.

7 Q. How many rooms are there in the house aside from closets and halls?

A. The house was thirty-nine feet front, and sixty-two and one-half feet deep. Two stories and eleven or twelve rooms. Barn thirty by about thirty-two feet. Two stories.

8 Q. Under whose directions were these improvements made, and who paid the money for them?

A. J. T. Brooks, executor of my father's estate.

9 Q. What other heirs are there to your father's estate other than yourself and your wife, your two children and the three children of your deceased sister, which you have named?

A. Not any.

10 Q. What other heirs are there to your mother's estate than those above named?

A. Not any.

11 Q. What portion of this house, which you now live in, as a homestead, is now furnished, and how furnished? Please describe the furniture, as near as possible.

A. The house is all furnished. All the rooms are covered with matting and linoleum, and three are carpeted. To the best of my recollection, there are five or six chamber sets. One piano. Some of the rooms have painted floors. One sofa, and four chairs of rose-

wood, one ebonized table, two stuffed chairs, one mahogany rocker, one stained table in sitting-room, two cane chairs, one walnut sofa, one small cane rocker, one dining-room table and eight chairs, one oak chair, one old-fashioned chair, one mahogany sofa and
140 table. The chamber sets, above mentioned, consisted of three marble-top bureaus, one marble-top dresser, one wood-top bureau, five bedsteads, five washstands or commodes, one bureau, two bedsteads, in servants' room, one bedstead and bureau—old-fashioned, one kitchen table, and two chairs, one laundry stove, four porch chairs, one library desk with bookcase on top. Above includes all the furniture in use, and stored on place.

Testimony of Mrs. H. L. Hanna.

By J. Wm. Ball:

1 Q. Mrs. Hanna, please state your name, age and place of residence.

A. Mrs. H. L. Hanna, age forty; 1755 Euclid avenue, Cleveland, Ohio.

2 Q. How long have you lived at 1755 Euclid avenue?

A. It has been our place of residence twice—about ten years ago the first time. The first residence there expired about four years ago, on the February, before the death of Robert Hanna, and I returned again one year ago in November, 1884, and have lived there ever since.

3 Q. Where did you reside from the February before the death of Robert Hanna, and November, 1884?

A. At the homestead, 656 Prospect street.

4 Q. Who was living in the same house with you at 656 Prospect street?

A. We were living with Mrs. Robert Hanna up to the time of her death; afterwards the children of the daughter, Mrs. Robert Hanna, were with us.

5 Q. How long did you live there during Robert Hanna's lifetime?

A. We went there in February, and Mr. Hanna died in April.

6 Q. How much of a family had you at that time? Please state their names and ages.

141 A. I had two children. The oldest daughter is now fifteen, the younger is four and one-half.

7 Q. Where was your husband residing at that time?

A. He was with us.

8 Q. Then, during the lifetime of Mr. Hanna, from February to April, the time of his death, you and your husband, and two children, were residing with him, were you not?

A. We were.

* * * * * * *

23 Q. Is the house that you now reside in the same house that you resided in on these premises before Robert T. Hanna's death?

A. It is not.

24 Q. What has become of the house that was formerly on that lot?

A. It was sold and moved away.

25 Q. Who sold it, if you know, and to whom was it sold?

A. I don't know who sold it, and it was sold to a stranger.

26 Q. Who erected the house that you now live in, or furnished the money to build it?

A. The executor of Robert Hanna's estate.

27 Q. What was the cost of the house, if you know?

A. I don't know.

28 Q. Where did you reside during the time the house was being built?

A. At the homestead, 656 Prospect street.

* * * * * * *

39 Q. How many are there of those children, and what are their ages?

A. There are three, Harriet Whitaker, eighteen; Mary Whitaker, fourteen; Robert Whitaker, twelve.

142 40 Q. How much do you receive for board for them, and from whom do you receive it?

A. Receive five dollars per week for each of them, and receive it from Mr. Brooks, executor of Mr. Hanna's estate.

41 Q. You say that the house that you live in was erected by the estate of Robert Hanna. I will ask you who owns the land that the house is located upon.

A. It is owned by the estate of Robert Hanna.

42 Q. Was the house erected as a home for C. B. Hanna and family, or for what purpose was it erected, if you know?

Question objected to by Judge Dickey.

A. My understanding is, that it was erected as a home for the heirs of the estate that are all included under its roof.

43 Q. As a matter of fact, you and your husband and your two children live there, and board the children of Mrs. Whitaker, C. B. Hanna's sister, do you not?

A. We do.

44 Q. What, if any, rent do you pay, or any one pay for you?

A. I don't know.

* * * * * * *

46 Q. What, if any, do you get, or your husband, from the executor of Robert Hanna's estate for the support of your family?

A. I don't know, beyond what I have stated as board for my husband's sister's children.

* * * * * * *

57 Q. What is his post-office address?

A. I don't know now.

58 Q. What, if anything, have you known of his leaving Los Angeles?

A. Nothing whatever.

59 Q. Why do you state that you don't (know) where he
143 is, if his last post-office address was Los Angeles and he was there the last you knew of him?

A. Because he expected to leave Los Angeles, and was undecided as to where he should go, and I have not heard from him since.

60 Q. When do you expect him home?

A. I don't know.

61 Q. How long did he tell you he should remain away from home when he left?

A. He didn't say.

62 Q. What, if anything, did he say as to moving his family or residence from Cleveland?

A. It has never been mentioned.

63 Q. You don't wish us to infer, Mrs. Hanna, that he has abandoned his family, do you?

A. Not by any means.

64 Q. Please state, then, where his home and residence is at this time.

A. His home is No. 1755 Euclid avenue.

By consent of parties, the testimony of C. B. Hanna and Mrs. Hattie L. Hanna, of which the foregoing is a partial transcript, taken before Mr. —— Marsh, special master, shall, in so far as competent, be introduced and accepted as evidence in this hearing.

Attest: IRVIN BELFORD, *Master.*

Agreement of Lease.

This agreement was made this ninth day of September, in the year 1885, by and between J. T. Brooks, executor and trustee of Robert Hanna, deceased, and any successor or successors in said trust, as first party, and the Columbus & Hocking Coal and Iron Company, as second party, bears witness:

The first party, in consideration of the payments and cove-
144 nants hereinafter stipulated to be paid and performed by the second party, hereby grants to the second party the exclusive right, permission and license to enter upon, mine and remove the coal from the following-described premises, to wit: Lot eight (8), in section 15, township 13, range 15 in Hocking (formerly Athens) county, Ohio.

The first party also further grants to the second party the right to occupy and make use of so much of the surface of said land, as will enable the second party to efficiently and properly conduct said mining operations. Also the right to make use of so much of the timber on the surface of said premises as may be necessary in mining coal on said premises.

In the consideration of the above the second party hereby accepts the grant herein made by first party, and agrees to mine the coal on said premises, and to take therefrom, or to pay royalty on not less than 50,000 tons of coal in each and every twelve months' period, from and after the first day of September, 1885, and so continue to

mine and pay royalty until all the coal that can be practically mined on said premises shall be so mined and paid for; provided, that if the second party shall not find it practicable to remove more than 25,000 tons of coal during the first period of twelve months under this lease, the remaining 25,000 tons due for said period shall be mined or paid for in addition to the stipulated 50,000 tons in the year following.

The second party further agrees to conduct such mining operations in a good and workmanlike manner, and especially in such manner that all the coal that can be practicably mined on said premises shall be so mined and paid for.

The second party agrees to furnish the first party within three months of the date of this contract, a map and specifications of the plan on which the second party proposes to conduct the mining operations on said premises; said map to show upon a proper scale the entire area of said premises and the various main and side entries by means of which the second party proposes to conduct said mining operations. Also the size and location of pillars which it proposes to leave in order to keep said mine in a perfectly good condition, until all the coal, as aforesaid, shall be removed from said premises. Such plan and specifications of the work so to be furnished shall be deemed to be a part of this contract, and must receive the approval of the first party before this contract shall be deemed to have any force whatever.

The second party agrees to pay to the first party as royalty for the coal to be mined and taken from the premises as aforesaid, in each month, the sum of ten (10) cents per ton of 2,000 pounds for lump coal, such as usually passes over an inch-and-a-quarter screen. Said payment to be made to the first party without demand at such place in Ohio, or State adjacent thereto, as first party shall in writing direct, and in drafts or funds that shall be bankable at par in the city of Cleveland, Ohio, on or before the twentieth day of the month following the month in which such coal shall have been mined.

It is the intention of the parties that said monthly payments under this contract, at least to the amount of $416.67 each, shall be made regularly, whether the monthly proportion of coal on the basis of 50,000 tons per annum shall have (been) mined or not, and that any payment so made in advance of coal actually mined shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for. Also, that said second party shall be deemed to have fulfilled its covenant in respect to payment of royalty during the first two years of this lease if it shall pay monthly on the basis of 25,000 tons per year for the first of said twelve-months periods, and on the basis of 75,000 tons per year for the second of said twelve-months periods.

The second party further agrees to furnish the first party monthly at the time of remittance, as aforesaid, a written report, the same to be signed by the chief engineer or other proper officer of the second party, which report shall show the number of

tons of coal which may have been mined during the month preceding the month in which said report shall be furnished; also the total number of tons mined on said premises to the date of said report; also a description of the location in the mine from which the coal mined in the month preceding such report shall have been taken, and the area uncovered by the coal so mined. Such report to be in such form and so changed from time to time as the first party may desire—to the end that the first party may by means of such monthly reports be at all time- promptly and fully advised of the amount of coal which may have been taken from said premises under this lease, the amount paid thereon, and the place from which the same shall have been taken.

The first party reserves the right, and the second party hereby grants the same to the first party, either in person or by his duly authorized representative, to enter upon said premises and any and every part thereof at reasonable hours during the day and night for the purpose of inspecting the manner in which the work of mining said coal and maintaining said mine is being conducted, and verifying by measurement or otherwise the amount of coal that has been taken therefrom, and for this purpose also to enter upon and pass over any lands owned or controlled by the second party.

The second party also further grants to the first party and to his duly authorized representative the right to inspect the books and papers of the second party wherever situated in so far as the same relate to the operations of the second party under this lease, for the purpose of determining and verifying the accuracy of the
147 reports which may be made to the first party as aforesaid in respect to the amount of coal mined on said premises, and the place or places from which the same may have been taken.

The second party further agrees to pay whatever taxes may be levied, or fees or expenses that may be incurred under the State or national laws in respect to the coal which may be mined by it as aforesaid under this contract, or in respect to its mining operations under the same, but the first party shall pay the taxes which may be lawfully assessed upon the land and the coal which is not mined.

If the second party shall fail, neglect or refuse for a period of thirty days, after the same becomes due, to make any monthly payment, as herein provided, this lease may, at the option of the first party, and not otherwise, — declared forfeited; and, in event of such forfeiture, the first party may at once re-enter upon and take and hold exclusive possession of the demised premises and every and any part thereof; or, if the second party, for a period of thirty days after written notice and request by the first party, shall fail, neglect or refuse to perform either or any of the covenants in a manner as herein stipulated to be by it performed, this contract may, in like manner, be declared forfeited at the option of the first party, and not otherwise; and, in case of any such default, the first party shall have a lien upon all the improvements, tracks and fixtures which may have been constructed or placed upon or under the surface of the premises hereby granted to the second party, as

security for the full performance by the second party of each and every covenant and payment herein stipulated by it to be paid or performed. And no part of the property of the second party that shall have been placed or constructed on said premises by it shall be removed therefrom by said second party as long as any portion of the royalty due the first party under this agreement shall be unpaid. And nothing herein contained shall be held to
148 debar the first party from the exercise of all legal and equitable rights and remedies which may or can accrue to the first party in consequence of a breach of this contract in any respect by the second party, and all such rights and remedies are hereby declared to be in full force.

The first party agrees that in case the mining operations of the second party under this contract shall be temporarily interrupted by strikes or through means or agencies beyond its control, the obligation of the second party to mine and pay royalty on the amount of coal which it would otherwise be required to mine and pay for under this contract shall not be enforced by the first party. But it shall be the duty of the second party to use all reasonable efforts to overcome the obstacles which may thus temporarily interrupt its mining operations on the property aforesaid, and to resume the same as soon as possible, it being understood that (inability to sell coal or inability to pay royalty shall not be deemed to be an element beyond the control of the second party in consequence of which monthly payments of royalty may be suspended, and that) save and except the period or periods during which the second party may be interrupted as aforesaid, the second party shall be deemed to be liable for the payment to the first party or his successor in said trust the amount of royalty which would be due under the terms of this contract in respect to coal mined each month the same as if said coal had actually been mined.

It is further agreed, that the second party shall make no sale, transfer or assignment in any form of its rights under this agreement, nor sublet any portion of the premises hereby demised, without first obtaining the written consent of the first party hereto; and any such sale, transfer, assignment or subletting, without the consent of the first party in writing, shall be null and void.

It is also further agreed, that when the second party shall have mined and paid for all the coal that can be practically
149 mined on the premises hereby demised, shall have fully performed all the covenants herein stipulated by it to be performed, the second party shall be permitted to remove from said premises all the tracks, fixtures and other property which it may have upon said premises at the time of its fulfillment of this contract, as aforesaid.

The first party agrees to grant to the second party, in case the latter shall so desire, a right of way over or through any portion or portions of the property hereby demised, for the purpose of getting acess to and from other property adjacent thereto on which the second party may be conducting mining operations, and of transport-

ing coal and materials to and from the same, upon payment by the second party of reasonable compensation therefor.

If any dispute shall arise between the parties, hereto, respecting the rights and the obligations of either under this contract, which cannot be amicably settled between them, they hereby agree to refer the same for settlement to three competent disinterested arbitrators, one of whom shall be chosen by each of the parties, and, the two thus chosen, shall select a third. If either party, upon notice from the other party, refuses to appoint the party not in default, after ten days' refusal, as aforesaid, — appoint an arbitrator for a party in default, and, the two thus chosen, shall select the third, and, in either case, the decision of all the arbitrators upon the matter in dispute, after due notice of time and place of hearing being given to each party to appear and be heard, shall be final.

In testimony whereof, the parties have hereunto set their hands and seals, the day and year hereinbefore first written.

Witness- as to J. T. Brooks—
L. L. GILLENT.
W. C. BOYLE.

J. T. BROOKS,
Executor and Trustee of Robert Hanna, Deceased.
THE COLUMBUS & HOCKING COAL AND IRON COMPANY,
[SEAL.] By WALTER CRAFTS, *President.*

150 I hereby certify that the following is a true copy of a resolution of the board of directors of the Columbus & Hocking Coal and Iron Company, passed at a meeting of said board, at their office at Columbus, O., September 9, 1885.

H. D. TURNEY, *Secretary.*

Resolved, That the president be and he is hereby authorized and directed to execute in the name of and under the seal of this company and agreement of lease between J. T. Brooks, executor and trustee of Robert Hanna, deceased, and this company of the coal in lot eight (8) in section fifteen (15), township thirteen (13), range fifteen (15), in Hocking county, Ohio.

Requests by J. Twing Brooks for Findings.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee, Defendants.

Said J. Twing Brooks, trustee, requests the master to find:

1. As to whether Cassius B. Hanna, has at any time lived with his family, or personally occupied the house by said trustee on the Euclid-avenue lot, described in plaintiff's petition, within three years last past.

2. As to whether the said Cassius B. Hanna, at the time of the

execution of the will, set forth and described in the amended answer of respondent, was hopelessly insolvent and worthless, financially, and whether such insolvency was then known to the said Robert Hanna, deceased.

3. The amount of indebtedness due from said Cassius B.
151 Hanna, to the said Robert Hanna, at the time of the decease of the said Robert Hanna, and before that time charged to the said Cassius B. Hanna, as an advancement in excess of what had been received by Arrial, daughter of the said Robert Hanna, deceased.

4. As to what amount, if any, of the principal of said estate, in addition to one-half the income thereof, has been used by this trustee in providing the ordinary comforts of life for the wife and children of the said Cassius B. Hanna.

5. We also ask the master to further find that the claimed gift to C. B. Hanna and his family was deemed by said executor and trustee to be subject to the discretion of the executor, and that he, as such executor, has heretofore at all times exercised an honest discretion in the construction of the will and distribution of the assets and income of the estate in controversy, and has faithfully endeavored to honestly exercise this discretionary power, as he believed he was entitled to do.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for J. Twing Brooks, Executor and Trustee.

Requests by Complainant for Findings.

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS *vs.* CASSIUS B. and HATTIE L. HANNA and J. T. BROOKS, Trustee, *et al.*	Requests for Findings of Fact Before the Special Master.

The special master, heretofore appointed herein, is respectfully requested by counsel for the complainant to find as matters of facts as follows, among other things:

1. In response to the paragraph in the interlocutory order of appointment directing the inquiry of the special master, marked "2."

152 The net income arising from the estate of Robert Hanna, deceased, since the twentieth day of November, A. D. 1889, after paying the taxes and other charges as directed by the eighth item of said will, amounts to $23,712.15, and including the royalties received from the coal property, the present net income of said estate is about ($13,000.00) thirteen thousand dollars per annum, including the royalties from the coal property.

And in response to the paragraph in said interlocutory order marked "3," as follows:

Said net income has been applied and disposed of by the executor by paying a part thereof to the beneficiaries named in the will, and by investing the remainder for their benefit.

Of the one-half of said net income there has been advanced or appropriated towards the support of said Cassius B., or for himself and family up to the twentieth day of November, A. D. 1889, fourteen thousand nine hundred and ten and $\frac{78}{100}$ ($14,910.78) dollars, and there has been retained of this half of the net income and invested for said Hanna, including the royalty received from the coal property and the stock dividend secured from the Union Steel Screw Company, ten thousand ($10,000) dollars in money and twenty-one shares of stock in said last-named company, now valued at thirty-three hundred and sixty ($3,360.00) dollars.

Since November 20, 1889, of said net income there has been advanced to or appropriated towards the support — said Cassius B., or for himself and family, three thousand five hundred and eighteen ($3,518.00) dollars, and there has been retained of the one-half of this net income and invested for said Hanna, by the trustee, including one-half of the royalties received from the coal property, eight thousand three hundred and thirty-eight ($8,338.00) dollars.

There is also an amount due to the trustee from the Ohio
153 National bank of undivided surplus of said bank, one-half of which, when paid, belongs to said Cassius B. on account of income. The one-half, as estimated by the bank officials, is seventeen hundred and thirty-two and $\frac{50}{100}$ ($1,732.50) dollars.

The youngest child of the testator's daughter, Arrial, will arrive at majority in about four years. (Page 26, Brooks' testimony.)

Under the direction given in seventh item of the will the trustee caused to (be) built a house for Cassius B. Hanna, at a cost of ten thousand five hundred ($10,500) dollars, and upon its completion, said Hanna, together with his family, went into occupation of the same, free of rent, and still occupies the same.

The children of the testator's daughter, Arrial, were boarded in Cassius' family at the price of five dollars per week for each, which price was paid to Cassius or his family by the trustee.

The house and land known as 1753 Euclid avenue, in Cleveland, Ohio, *and* has a rental value of $1,000 a year.

I find that Cassius B. Hanna has an equitable life estate in said premises.

I find the increase of the personal property of said estate collected and received by the trustee, which has been retained and invested by him amounts to forty-eight hundred and sixty-one and $\frac{46}{100}$ ($4,861.46) dollars, one-half of which is $2,430.73, the interest of C. B. Hanna therein.

The increase in the value of the real estate at the corner of Erie and Superior streets, since November 20, 1889, has been thirteen thousand ($13,000) dollars.

The increase in value of the 170 shares of the Union Steel Company's stock, has been eight thousand five hundred ($8,500) dollars, since the estate came into the hands of the trustee.

With respect to the Hocking coal property, I find as a
154 matter of fact it had no value other than for mining purposes, either before or after the death of Robert Hanna, the testator; that the trustee under the powers given him by the last will of Robert Hanna, executed a lease of said lands to the Columbus & Hocking Coal and Iron Company, by which the last-named company was obliged to pay a rental of $416.66 per month at least, whether any coal is mined or not, and ten cents per ton royalty on all coal mined in excess of 50,000 tons per year. The said company by said lease acquired a right to mine coal on said premises, and the trustee as lessor, reserved the right to forfeit the lease and license to mine at any time when the lessee failed to pay the stipulated rental when due, whether coal was mined or not.

The lease was executed in August, 1885, and the lessee has been in possession ever since. No mining has been done, except by the way of pushing entries, and no coal has been taken out. The trustee has received as rental from the lessee thirty thousand ($30,000) dollars.

All of which is respectfully submitted.

FRANCIS J. WING AND
J. WM. BALL,
Solicitors for Complainant.

Which said master's report had the following endorsement thereon, F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Report of master. Filed January 23, 1892, Irvin Belford, clerk, United States circuit court.

Afterwards, at the October, A. D. 1892 term of this court, to wit, on January 28, 1892, this cause was continued to the next term of this court.

155 *Exceptions of Complainant to Master's Report.*

Afterwards, to wit, on January 30, 1892, exceptions to master's report were filed herein, which reads and *is* in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant, *vs.* CASSIUS B. HANNA *et al.*, Defendants. } Exceptions to the Report of Special Master. No. 4743.

Now comes F. A. Raynolds, complainant, by his solicitors, and excepts to the report of the special master, heretofore appointed herein, in the following particulars, to wit:

1. To that part of his report, in which he finds that the stock dividend declared and made by the Union Steel Screw Company, is a part of the body of the estate, and not income of the estate of Robert Hanna, deceased.

2. To that part of the report, in which he finds that the amount due from the late Ohio National bank, to the trustee, is a part of the estate, and not a part of the income thereof.

FRANCIS J. WING AND
J. WM. BALL,
Solicitors for Complainant.

Endorsed: No. 4743. United States circuit court, northern district of Ohio. Francis A. Raynold *vs.* Cassius B. Hanna *et al.* Exceptions to the report of special master. Filed January 30, 1892.

156 *Exceptions of J. Twing Brooks to Master's Report.*

Afterwards, to wit, on February 6, 1892, exceptions were filed herein, which exceptions read and are in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant, *vs.* CASSIUS B. HANNA *et al.*, Defendants. } In Equity. Exceptions to the Report of Special Master Irvin Belford. No. 4743.

And now comes J. Twing Brooks, executor and trustee of the estate of Robert Hanna, deceased, and excepts to the report and findings of the special master, Irvin Belford, herein, in the following particulars, for the reason that there is not sufficient evidence to sustain such findings, or either of them, and that they are not facts, to wit:

1. This defendants excepts to the findings of said special master, that the paper writing *to* referred to in said report, as a lease of coal lands to the Columbus & Hocking Coal and Iron Company, was a lease of said lands, and not a sale of the coal underlying the same, and the finding of said master, that the said J. Twing Brooks, as such executor and trustee, did not sell said coal, but leased said lands, and that the money received from said grantee was not purchase-money paid for coal, but was rental, and, therefore, income, and not capital belonging to said estate, which said finding is upon pages 2 and 3 of said report.

2. This defendant, as such executor and trustee, excepts to the following finding of said special master, to wit: "That it was the evident purpose on the part of the testator to make the provision for the maintenance of Cassius B. Hanna," "and the remainder over to the grandchildren of Cassius, a 'secondary object.'"

3. The said J. Twing Brooks, executor and trustee of said
157 estate, also excepts to the following finding of said master, as found on page 11 of said report, to wit: "That there has been retained and invested for said C. B. Hanna, by the trustee, the sum of $8,312.51, or any other sum."

This defendant avers, that there is no evidence, and it is not the

fact, that any amount of money has been retained and invested by him for said C. B. Hanna.

4. The said J. Twing Brooks, executor and trustee, as aforesaid, also excepts to the following findings of said master, found on page 12 of said report, to wit: That he, the said trustee, "set apart by said executor for C. B. Hanna and family, not including royalties from the coal lease, amount to the sum of $14,062.93."

5. The said J. Twing Brooks, as such executor and trustee, also excepts to the following finding of said master, on page 13 of said report, to wit: "I find the increase of personal property of said estate collected and received by trustee, which has been retained and invested by him amounts to $—, one-half of which is the interest of C. B. Hanna therein."

This defendant says, that in no portion of the property of said estate, which has been retained and invested by him, has the said C. B. Hanna any vested interest or right of control, or right, present or future, to demand the same.

6. The said J. Twing Brooks, executor and trustee as aforesaid, also excepts to the following finding, found on page 15 of said report, to wit: "The books of account of said trustee show that on November 20, 1889, the time when the complainant's bill herein was filed, the income account due to Cassius and his family, was overdrawn $847.85;" for the reason that this defendant maintains that there is no testimony showing that at any time under the provisions of said will, any sum of money was due to either the said Cassius B. Hanna or his wife, or that the said Cassius B Hanna and
158 his wife, at any time, under the provisions of said will, had any right to demand the same of this defendant, as such executor and trustee.

7. The respondent excepts to the finding of the master, in relation to receipts and disbursements, for the period, from November 20, 1889, to September 1, 1891, in that it makes the account retained by the master, exclusive of royalty, larger than disbursements.

8. The respondent excepts to the report of the master as to the receipts and disbursements, prior to November 20, 1889, because not required by the order and radically wrong.

9. The respondent excepts to the report of the master, because he had excluded certain charges made to Cassius B. Hanna, included in the testimony of the respondent.

10. The respondent excepts to the report of the master because he had made no allowance or credit for the time and services of executor.

This respondent therefore prays that the said several findings of the special master, Irvin Belford, hereinbefore referred to and excepted to, may be set aside and held for naught, and for such other and further relief in the premises as equity and good conscience may require.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for J. Twing Brooks,
Executor and Trustee, Respondent.

Endorsed: No. 4743. United States circuit court. F. A. Raynolds, plaintiff, *vs.* Cassius B. Hanna *et al.*, defendant-. Exceptions to the report of special master. Filed February 6, 1892. Irvin Belford, clerk United States circuit court.

Second Reference of Cause to Master.

Afterwards, at the February, A. D. 1892, term of this court,
159 to wit, on March 4, 1892, an order was made and entered herein, which order reads and is in the words and figures following, to wit:

F. A. Raynolds
vs.
Cassius B. Hanna *et al.* } Chancery. No. 4743.

It being suggested by the master, upon representation made by defendant, J. T. Brooks, that there are errors in the testimony in relation to the accounts for receipts and disbursements during the time mentioned in this decree that ought to be corrected, a memorandum of which has been furnished said master.

It is therefore ordered that this cause be referred to the master, to correct said errors, and to amend his report according to the facts.

Continuance.

Afterwards, at the February, A. D. 1892, term of this court, to wit, on March 12, 1892, this cause was continued to the next term of this court.

Supplemental Report of Master.

Afterwards, to wit, on May 4, 1892, a master's report as filed herein, which report reads and is in the words and figures following, to wit:

Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. Raynolds, Complainant,
vs.
Cassius B. Hanna *et al.*, Defendants. } In Equity. No. 4743.

To the Hon. Howell E. Jackson and the Hon. William H. Taft, judges of said court:

In pursuance of supplemental order made in this cause by the Honorable Augustus J. Ricks, district judge, at a stated term of this court held at the court-rooms in the city of Cleveland,
160 in said district, on the fourth day of March, A. D. 1892, by which the report of the special master heretofore filed herein was referred back to Irvin Belford, special master, to take further testimony and correct said report as to certain errors therein con-

tained, I, Irvin Belford, special master aforesaid, do respectfully report, that on the twelfth day of April, 1892, I proceeded to investigate the matters so referred to me, and that pursuant to summons duly issued, I was attended by solicitors of the parties, complainant and defendants, and after taking additional testimony, I find and report as follows:

By reason of omissions in the testimony taken at the former hearing, and as a result of clerical errors, there are errors and mistakes in the report of the master heretofore. On the twenty-third day of January, 1892, I filed herein *in* the following items and findings, to wit: Findings No. 7, No. 8, No. 9, No. 10, No. 13, No. 14 and No. 20, and I therefore find that according to the evidence and according to the fact, the said several findings should be corrected and revised so as to read as follows:

Finding No. 7.

I find that the net income annually arising from said estate, from November 20, 1889, after paying taxes and other expenses and charges, including compensation for the time and services of the executor as directed by the eighth item of the will, up to March 31, 1892, including royalties received from the lease of land for coal-mining in Hocking county, is as follows, to wit:

From Nov. 20, 1889, to Dec. 31, 1889	$1,279 33
From Jan. 1, 1890, to Dec. 31, 1890	13,561 08
From Jan. 1, 1891, to Dec. 31, 1891	10,839 19
From Jan. 1, 1892, to Mar. 31, 1892	3,134 61
Total	$28,814 21

Such income for the periods named was made up as follows:

1889, royalty.	$555 54, other sources.	$723 79	$1,279 33
1890, royalty.	5,000 00, other sources.	8,561 08	13,561 08
1891, royalty.	5,000 00, other sources.	5,839 19	10,839 19
1892, royalty.	1,250 00, other sources.	1,884 61	3,134 61
Totals.	$11,805 54	$17,008 67	$28,814,21
One-half portion of net income			$14,407 10

161 *Finding No. 8.*

I find that since November 20, 1889, up to March 31, 1892, of the one-half of said net income, including royalty, there has been advanced to or appropriated for the support of Cassius B. Hanna, or for himself or family the following amounts, to wit:

From Nov. 20, 1889, to Dec. 31, 1889	$2,376 50
From Jan. 1, 1890, to Dec. 31, 1890	2,518 00
From Jan. 1, 1891, to Dec. 31, 1891	1,500 90
From Jan. 1, 1892, to Mar. 31, 1892	400 00
A total of	$6,794 50

And that of said half portion of said net income for the period named, there has been invested and retained by said executor the sum of $7,612.60.

In the execution of his trust, the executor, Brooks, has treated all royalty as capital and not income, and he has never kept a separate investment account to the credit of any of the individual beneficiaries under the will, but all investments have been made on account of the estate, and inured to the beneficiaries in common. He has, after paying all necessary and proper expenses, separated the net income arising from the estate into two equal parts, one of which was set apart for C. B. Hanna and family, and the other was set apart for the children of the deceased daughter, Arrial.

Finding No. 9.

I find that the present annual net income of said estate including royalty from coal lease, as nearly as the same can be estimated, is $11,500.00.

Finding No. 10.

I find that the net income, prior to November 20, 1889, has been applied and disbursed by the executor by paying a part thereof to the beneficiaries under the will and by investing the remainder for their benefit. I find from the evidence, that prior to November 20, 1889, the income account of said estate set apart by said ex-
162 ecutor for C. B. Hanna and family, exclusive of royalties from the coal lease, and including $2,125, supposed to be due on stock dividends, was as follows, to wit:

March 31, 1883	$3,701 62
" 31, 1884	2,137 37
" 31, 1885	881 93
Dec. 31, 1885	271 84
" 31, 1886	990 94
" 31, 1887	1,927 99
" 31, 1888	2,500 32
Nov. 20, 1889	1,659 45
Total	$14,161 46
And that during the same period the one-half of royalties received amount to	$10,486 64
Total income including royalty	$24,648 10

Of this one-half of said net income, there has been advanced to or appropriated towards the support of said Cassius B. Hanna, or for himself and family, including $2,125 on account of stock dividends in the Union Steel Screw Company, prior to November 20, 1889, the following amounts:

1883, Mar. 31	$4,785 00
1884, Mar. 31	2,575 00
1885, Mar. 31	1,439 68
1885, Dec. 31	300 00
1886, Dec. 31	506 63
1886, Dec. 31	860 00
1888, Dec. 31	2,486 10
1889, Nov. 20	1,900 00
A total of	$14,852 41

And that there has been retained of this half of the net income, and prior to November 20, 1889, invested by the executor, the remainder thereof, to wit, $9,795.69.

Finding No. 13.

I find that soon after the executor entered upon the administration of said estate, for his own protection and convenience, he called to his assistance three judicious disinterested persons, viz., W. T. Jones, John McClymond and Solon Burgess, who made an inventory and appraisement of the personal property of said decedent, which came into the hands of said executor, which said inventory was filed in the probate court of Cuyahoga county, Ohio, and a copy of which is herewith filed. That the estimated value of such personal property, made by said appraisers, was $70,593.18.

That since said executor entered upon his trust he has
163 realized from the sales and on account of such personal property, the sum of $42,319.73; and that on the first day of November, 1891, he had personal property, including stocks, notes and credits in his possession, estimated by him to be worth $49,739.00.

Inasmuch as said executor has invested the proceeds of a part of the personal property disposed of in other securities, included in said estimated value of $49,739.00, and as no evidence as to that matter has been submitted, the master is unable to state the increase or decrease in value of personal property.

Finding No. 14.

The evidence leads me to conclude that the Cowles property, corner of Erie and Superior streets, Cleveland, at the time the same was deeded to the executor, was worth about sixty thousand dollars, and the evidence also makes its present value about $68,500.00, and I find that the increase in the value of the same since November 20, 1889, is about five thousand dollars. Mr. Brooks testified that he had traded for this property as an investment in real estate.

Finding No. 20.

I find that in addition to the $10,500 expended in the construction of the house at 1753–5 Euclid avenue, Cleveland, which con-

stitutes the home of Cassius' family, free of all expense, in connection with the care and repair thereof, that the executor has at various times advanced out of the assets of the estate various sums, at one time aggregating over $3,000.00, to provide the ordinary comforts of life for the wife and children of said Cassius B. Hanna, and that he now holds, as assets of said estate, notes and evidences of indebtedness of said Cassius B. Hanna, advanced for said purpose, amounting to the sum of $1,950.

It also appears from Mr. Brooks' testimony, that, to relieve
164 some pressing necessity of Cassius, he gave him $900 realized as a consideration for the release of a claim of the estate against the Colorado stamp-mills, and that that amount was not charged up as income.

At the request of counsel for both complainant and defendant, I submit the following additional findings, to wit:

Finding No. 22.

That the income account to the credit of C. B. Hanna and family from other sources than royalty, on the twentieth day of November, 1889, the date when complainant's bill was filed, was overdrawn, to the amount of $690.95.

Finding No. 23.

On December 28, 1889, the executor, Brooks, upon the written request of Cassius B. Hanna, and in pursuance of a former agreement, paid to Mrs. Ford, of Cleveland, the sum of $1,876.50 out of Cassius' share of income, and charged that amount up to his account; and I find that such payment should be credited to the executor on that account, and I also find that during the period from November 20, 1889, to March 31, 1892, the income account of C. B. Hanna, from sources other than royalty, exceeded payments to him, and on his account in the sum of $1,709.85.

Finding No. 24.

I find that exclusive of income, from royalty, there was, on the thirty-first day of March, 1892, an unexpended balance to the credit of the income account of C. B. Hanna, and in the hands of the executor amounting to	$1,018 88
And that the one-half of the income, on account of royalty in the hands of the executor, March 31, 1892, amounts to	16,389 41
Total	$17,408 29

I desire to substitute the foregoing findings for the findings herein referred to and indicated, appearing in the original reports of the special master.

165 I respectfully refer to Exhibit- A 2, B 2, C 2, D 2, and F and G, as constituting parts of this report; Exhibits A 2, B 2, C 2,

and D 2, being transcripts from the books of account of the executor relating to said estate, and referred to in the testimony and deposition of H. G. Oliphant. Exhibit F being the copy of the inventory and appraisement of the personal property made by the executor, and G being the testimony of J. Twing Brooks and H. G. Oliphant, taken on the examination on April 12, 1892.

It was agreed by and between counsel for complainant and counsel for defendants, that the master's report should embrace the statement of income and expenditures to March 31, 1892; and that the fees for service of J. G. Pomerene should be taxed up as part of the costs, all of which is respectfully submitted.

IRVIN BELFORD, *Master.*

Dated this third day of May, 1892.

Testimony of H. G. Oliphant.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA *et al.*, Defendant-.

In pursuance of the authority contained in the supplemental order made in this cause by the Honorable Augustus J. Ricks, district judge, at a stated term of this court, held at the United States court-house, in the city of Cleveland, on the fourth day of March, 1892, I, Irvin Belford, special master, named in said order, in pursuance of notices thereafter issued, was attended on the twelfth day of April, 1892, at the clerk's office of said circuit court in said city of Cleveland by E. J. Estep, Esq., counsel for the defendant, J. Twing Brooks, and by J. William Ball, Esq., and F. J. Wing,
166 Esq., solicitors for complainant, and there appeared then and there before me as witnesses the Honorable J. Twing Brooks and Mr. H. G. Oliphant, who produced the books and papers relating to the administration of the estate of Robert Hanna, deceased, and the said H. G. OLIPHANT, being recalled for further examination, testified as follows:

By Mr. ESTEP:

Q. Who kept the books for Mr. Brooks in relation to the estate of Robert Hanna, deceased, say from January 1, 1889, down to December 31, 1891?

A. I did.

Q. Since your testimony was given before, have you made transcript from the books, showing the condition of the estate in 1889, 1890 and 1891, and up to December 31st in each separate year?

A. I have.

Q. Do they contain everything that is shown on the face of the books, in relation to the accounts with C. B. Hanna and his family?

A. They do; yes, sir.

Q. Will you furnish to the master each of those transcripts, from the books, in the shape in which you have them?

A. Yes, sir. Here are the statements.

The same are hereto attached as Exhibits A 2, Exhibit B 2, Exhibit C 2, examination of H. G. Oliphant, April 12, 1892, respectively.

Q. Have you the books with you from which these transcripts have been made?

A. I have; yes, sir.

Q. Will you exhibit them to counsel, on the other side, if they desire to compare your transcripts with the books?

A. Yes, sir.

167 Q. What was the condition of the account with C. B. Hanna and family on January 1, 1889?

A. There was an amount overdrawn January 1, 1889—$450.40.

Q. That overdraft comes from the year 1888, does it?

A. 1888; yes, sir.

Q. What was the amount paid to Hanna, and his family, in the year 1889?

A. $4,276.50.

Q. What was the amount of net income for the year 1889, credited to the account of C. B. Hanna and family?

A. $2,046.35.

Q. How much then did that leave him and his family overdrawn on the first of January, 1890?

A. $2,680.55.

Q. What was the amount advanced or paid to him and family during the year 1889?

A. $1,518.

Q. What was the amount of net income credited to C. B. Hanna and his family for the year 1890?

A. $4,280.54.

Q. How did the account then stand?

A. Overdrawn $918.01.

Q. What was the net income in that account from January 1, 1891, to December 31, 1891?

A. $2,089.64.

Q. What was the condition of the account at that date? What was the balance either due to them or to Mr. Brooks?

A. The amount to the credit of C. B. Hanna, $271.63.

Q. Now, I will inquire if in this statement of the net income there has anywhere been entered as income, royalty received from the Hocking Valley land?

A. No, sir.

Q. Now, in the statement which was before made, were there any errors?

168 A. Yes, sir; quite a number.

Q. I see, by Exhibit A, which you file now, a payment made of $1,876.50, in December, 1889, which is not in the former statement. Can you tell how that occurred?

A. No, I cannot; simply a mistake, I think.

Q. Were there any other items or errors in relation to what was paid to C. B. Hanna and his family in that account of 1889?

A. No, not in that period.

Q. Now, do you find any difference in the payments actually made to C. B. Hanna and his family for 1889, other than that $1,876.50, or for the year 1890?

A. Well, there are some in 1890.

Q. What is there in 1890?

A. July 26th, $50.

Q. Was that contained in the former statement?

A. No, that was not.

Q. How is that charged—C. B. Hanna?

A. That is charged to C. B. Hanna.

Q. Now, is that the only error you find for the year 1890?

A. That is the only one for 1890.

Q. Now, in 1891, on the account which you have filed here today there is $300 paid to Hanna and his family from the first of 1891, and the same amount in June 30, 1891. Do either of those appear in the former statement that is filed here?

A. No, sir.

Q. And they are in the exhibit which you filed today?

A. Yes, sir.

Q. Can you tell how that error occurred?

A. No, sir; I cannot.

By the MASTER:

Q. Mr. Oliphant, at the former examination, I took from your books, as they were presented, a statement of the net income
169 account set apart by the executor for C. B. Hanna and family, for the years ending March 31st, beginning with the year 1883, to December 31, 1890, and I used those in making up my report. I wish you would now give to the stenographer the net income for those years as they appear by your ledger.

Income Account.

March 31, 1883	$3,701 62
" 31, 1884	2,137 37
" 31, 1885	881 93
December 31, 1885	271 84
" 31, 1886	990 94
December 31, 1887	1,927 99
" " 1888	2,590 32
" " 1889	2,046 35
" " 1890	4,280 54

Q. What payments were made to Cassius B. Hanna and his family during the periods for which you have furnished the figures of net income? If you can, give the total for each year, as you have given the income, do so.

A.—

March 31,	1883		$4,785 00
" "	1884		2,574 00
" "	1885		1,439 68
Dec. "	1885		300 00
" "	1886		506 63
" "	1887		860 00
" "	1888		2,486 10
" "	1889		4,276 50
" "	1890		2,518 00

The amount for the year 1889 may be divided as follows:

The amount advanced from November 20, 1889, to December 31, 1889, $2,376.50.

Q. Give the amount of overdrafts to C. B. Hanna and his family during the same period if you can.

170 A.—

March 31,	1883		$1,083 38
" "	1884		437 63
" "	1885		557 75
Dec. "	1885		28 16
" "	1886, income in excess of payments		$484 31
Dec. 31,	1887, income in excess of payments		1,067 99
Dec. 31,	1888, income in excess of payments		104 22
Dec. 31,	1889, overdraft		2,430 15
Dec. 31,	1890, income in excess of payments		1,762 54

Q. Do your books show the investment by the executor of the royalty received from the Hocking Valley coal lands?

A. It does not show the specific investment of that royalty.

Q. Does the income account, to which you have referred, as to which you have testified, include interest received upon the investment of that Hocking Valley money?

A. It does; yes, sir.

J. Twing Brooks Recalled.

J. TWING BROOKS, recalled in his own behalf, testified as follows:

By Mr. ESTEP:

Q. I see by the exhibits produced by your book-keeper, that after November 20, 1889, you have charged Cassius B. Hanna with $1,876.50. Will you explain to the master why that was paid, and to whom you were under obligation to pay it, if you were so?

171 A. That sum was paid on this account: Cassius had, at one time, been in partnership with a Mr. Ford, of Cleveland, either in mines or in reduction works in Colorado, and he owed his partner, Mr. Ford, on that paternship account, a sum of money which, if I remember right at this time, was nearly $3,000. The circumstances under which he owed that money and withheld

it from Mr. Ford's estate were such that they were threatening him with arrest, and the emergency was so great that the only way in which I could prevent Mrs. Ford from taking action, was by saying that as soon as I could possibly get any income that might be due to Cassius, that could be spared from the feeding and sheltering of their family, I would give to her. Accordingly, Cassius executed an instrument of writing, requesting me, as soon as I could possibly do so, to pay that claim. Now, then, that claim was finally placed in the hands of J. G. W. Cowles, of this city, and, at the time named, I negotiated the settlement, and, in consideration of a reduction of several hundred dollars, I compromised the whole claim against Cassius for the amount named, and paid it, and charged it to his account.

Q. How long previous to November 20, 1889, had you agreed to pay it?

A. I had agreed with Mrs. Ford to pay that claim, I should say, within two years of the time of the death of Mr. Hanna. It must have been in the year 1883, or in 1884; I had an interview with Mrs. Ford in the office of her lawyer in this city, and the result of that interview was that I said that if she would forbear to do anything against Cassius, I would agree, as soon as the money could be saved from the income due to his side of the family, which was not absolutely needed for the shelter and feeding of the children, that I would pay that claim—and I think it was in the year 1883.

Q. I will ask you if the payment made at the time stated was in pursuance of that agreement?

A. It was in pursuance of that agreement and by means
172 of it. There was a large reduction from the amount which Cassius authorized me to pay.

Q. And he was protected from arrest by the agreement which was made?

A. He was.

Q. Now, say for the last two years, more or less, you giving the time, what amount of disbursements on the C. B. Hanna side have been made directly to him, for himself, personally, and not for his family?

A. About $1,550. I paid him about the month of May, 1890, $300. I paid him fifty dollars a month pretty regularly from that time on (to) the present date, for his individual support; and in October, 1890, about that time, I gave him about $150. From May, 1890, to this time, I have assumed to give him for his support, fifty dollars a month, and, in addition to that, in a certain extraordinary emergency, I gave him $300 at one time and $150 at another.

Q. And for what purpose were the balance of these disbursements made?

A. The balance of the disbursements were made to his wife for the maintenance of his wife and his two children.

Q. Can you estimate about how much a year it would require for the support of the family, and has required?

A. The books show exactly what has been expended, but it is not

a true criterion of what they should have, for this reason: They have gone without domestic labor; done their own work in the house for months at a time rather than incur the expense of ordinary servants; and, on the income which I have felt justified in giving them, they have not lived on the scale their grandfather intended them to, and what I wish they could do. The income did not justify me in giving them any more.

Q. Then you refer to the disbursements made instead of estimating the amount that ought to be applied for the support of the family?

173 A. The books show merely what has been paid, and I know that it is short of what it should have been to maintain them as they ought to have been maintained.

Q. It appears by the testimony heretofore taken, that at some time you loaned or advanced money to C. B. Hanna and his wife, and took their note for it. Do the amounts of those notes appear in the disbursement of income account here?

A. They do not. The money represented by those notes appears as part of the assets of the estate, as principal thereof, the same as if loaned to any other person or invested in any other security.

Q. Was there any agreement as to their being paid out of the assets of the estate in any way when the money was loaned?

A. There was no agreement about it. They simply had to have money for their decent support and protection, and there was no income to give them, and I took the responsibility of loaning them money, as I had a right to do with anybody else.

Q. Then the money was loaned to them for their support, in addition to income?

A. That is right, exactly.

Q. Can you give the amount of that?

A. The amounts, giving the notes as above referred to, are as follows: October 5, 1885, $200; December 1, 1885, $500; January 21, 1886, $150; April 4, 1886, $150; June 9, 1886, $250; August 27, 1886, $300; December 7, 1886, $150; March 1, 1887, $50; March 10, 1887, $100; August 23, 1887, $100. Total, $1,950, all bearing interest. Of these notes, part were signed by Cassius and his wife jointly, one or two by Cassius alone and others by his wife alone, he being at the time absent in California, and the money being needed by Mrs. Hanna for the support of the household.

174 By the MASTER:

Q. I want Mr. Brooks to give the amount due to him and unpaid on account of salary and compensation to him for those two periods?

A. According to the will my compensation is a thousand dollars a year. I pay myself $250 a quarter at the same time that I disburse income to the heirs. Under the will, my compensation may be paid either out of the income or out of the principal. In consequence of the limited amount of income as compared with the necessities of Cassius' side of the family, and, in order to leave the income as large as possible, I have been, for many years, taking my

compensation out of the principal of the estate. But for the time I began charging it against the principal of the estate, it has never appeared in the charges against income.

Q. And there is nothing due to you on that account?

A. No, sir.

Q. It has all been paid from a part of the principal of the estate?

A. I think from about 1885 I have been charging my compensation against the principal of the estate.

Q. At the time you testified before, you testified concerning the value of the Superior-street property. Have you had any means of correcting your opinion as to the value of that property since that time?

A. I have. I have been for the last four months making diligent efforts to sell the property through one of the leading real-estate agents in the city, Mr. Cowles, and he reported to me this morning that the highest offer to this time, that he had been able to get on that property, was $68,500. It has been advertised, and, by solicitation and argument, Mr. Cowles has been trying for three months to dispose of it, and that is the highest offer he has been able to get for it.

175 Q. Have you any means as to correcting your estimate as to the value of the other property, the Euclid-avenue property?

A. I don't know of any change in the valuation of that property.

Q. Have you changed your opinion as to the value of the other real estate in Missouri or elsewhere?

A. Oh, no; it remains exactly as when I last testified.

Cross-examination of J. Twing Brooks.

By Mr. Wing:

Q. You were speaking about paying $1,876, in pursuance of a contract with Mrs. Ford. The only consideration for that agreement, to pay that amount of Cassius' indebtedness, was the agreement of Mrs. Ford, not to prosecute him criminally?

A. Yes, sir.

Q. And did she so agree?

A. Yes, sir.

Q. Now, with respect to those notes that you have mentioned, taken by you from Cassius and his wife, and from Cassius alone, and from his wife alone, have you collected interest on those notes from out of the income from Cassius?

A. No; no interest, not a dollar of interest or principal has ever been paid on any money loaned to Cassius or his wife—either, or both of them.

Q. Can you state what proportion of those notes was simply signed by his wife without his signature?

A. My impression is, that the note of August 23, 1887, for $100, is the only one signed by her individually, and the one of June 9, 1886, for $250. But when Cassius left his home in the spring of 1886, he left a power of attorney in broad terms, authorizing his

wife to receive and receipt for any money that might be due
176 as net income to his side of the family under his father's will, and empowered her to execute and deliver receipts or notes in whichever form the executor or trustee might demand for money paid on his account.

Q. Give us subsequently to April 4, 1886, a piece of paper signed by her, that is, in her handwriting, but for him?

A. She usually signed down to a certain period, C. B. Hanna by H. L. Hanna, attorney, and then signed her own name, H. L. Hanna.

Q. Now, at the time you took the estate, a semi-official appraisement was made of the property, both real and personal?

A. Only the personal property. There was never any appraisement attempted of the real estate.

Q. Had the coal property in the Hocking valley been in the market, so far as you know, previous to you taking the estate, when Mr. Hanna owned it?

Q. I am not able to say that Mr. Hanna ever attempted to sell it, or that he ever had an offer for it. I did find among his papers, in a book, in which he kept certain accounts with his children and of his property, a memorandum, in his own handwriting, with which I was very familiar, showing his idea of the value of his real estate. He valued his homestead on Prospect street at $75,000. He valued his lands in Hocking county at $60,000. At the time he made this memorandum, which was about two years before he died, he still had some real estate adjoining the rubber works in East Cleveland, and put a valuation on it of about $10,000, but he had sold that before he died. These Missouri lands and Michigan lands, he appraised at a nominal value. They had been bought originally on the theory that they contained mineral deposits of value. They
had been tested and found wanting, and the- were simply
177 carried along by him for years on payment of small taxes, and some of them he had allowed to be sold for taxes, regarded them as worthless. Part of them I have redeemed and have carried them in the hope of yet getting something out of them.

Q. Have you any knowledge that he had tested the Hocking Valley lands?

A. I am certain he had never tested them, but he knew they were valuable from the fact that there were extensive developments in the immediate vicinity.

Q. You know the character of the Hocking Valley coal land, do you not?

A. I do.

Q. And the lands generally there?

A. Yes, sir.

Q. And is it not true that the fact of there being a coal deposit upon the lands, there is, to large extent, made known by the watercourses cutting those veins?

A. To a certain extent, I suppose that is true. I have seen in one place in this vicinity, and not far from the Hanna tract, a vein of coal exposed by the stream, just as you speak of.

By the MASTER:

Q. What, if anything, in the way of an opening for mining coal has been made on the Hocking Valley property, prior to Mr. Hanna's death?

A. None whatever.

By Mr. WING:

Q. Do you know there had been none?

A. I know there had been none, because in 1885 or 1886, when I made this lease, I *road* all around this property with John R. Buchtel, of Akron—it was to him I leased the land—and it was on the *the* adjoining tract, just on the other side of the hill, so to speak, I saw this big vein uncovered, and there was a Cincinnati firm that was just opening there.

178 I wish to say in this connection, and as throwing light on the subject of the value of Mr. Hanna's land in Hocking county, that if it had not been for one particular circumstance, I do not think I could have got half as much as I did out of the lease. That circumstance was this: The Columbus & Hocking Valley Coal and Iron Company owned coal lands adjoining those of Mr. Hanna's, they were expending $30,000 at the opening of their lands adjoining Mr. Hanna's tract, and that opening was not to exceed 500 feet distant from the Hanna tract, and, the only reason that they could be induced to give the high royalty which (was) exacted, was because they could utilize the extensive plant which they were constructing at the mouth of their own coal pit, for the purpose of mining the coal on the Hanna tract. The lease that I made was away in advance of anything made in that section of the country at that time, and for years afterwards, that I know of.

By Mr. BALL:

Q. In reference to the appraisal that was made at the time of Mr. Hanna's death, that was filed with the probate court, there has been no copy of that furnished. Will you furnish the master with a copy of the appraisal?

A. Yes, sir; I have a copy of it, and will furnish a copy to the master.

179 EXHIBIT "A," EXAMINATION OF H. G. OLIPHANT, APRIL 12, 1892.

C. B. Hanna:

1889.			
March	30.	Amount advanced.....	$600 00
July	1.	" "	600 00
Aug.	19.	" "	100 00
Oct.	1.	" "	600 00
		Amount advanced C. B. Hanna, from Jan. 1 to Nov. 20, 1889.....	$1,900 00

Dec.	16.	Amount advanced		$50 00
"	28.	"	"	1,876 50
"	31.	"	"	300 00
"	31.	"	"	150 00
		Amount advanced C. B. Hanna, from Nov. 20 to Dec. 31, 1889		$2,376 50
		Total amount advanced C. B. Hanna in 1889		$4,276 50

Hattie Whitaker:

Amounts advanced at various times from Jan. 1 to Nov. 20, 1889	$420 00
Amounts advanced at various times from Nov. 20 to Dec. 31, 1889	160 00
Total amount advanced her in 1889	$580 00

Mary Whitaker:

Amounts advanced at various times from Jan. 1 to Nov. 20, 1889	$570 00
Amounts advanced at various times from Nov. 20 to Dec. 31, 1889	160 00
Total amount advanced her in 1889	$730 00

Robert Whitaker:

Amounts advanced at various times from Jan. 1 to Nov. 20, 1889	$610 21
Amounts advanced at various times from Nov. 20 to Dec. 31, 1889	105 00
Total amount advanced him in 1889	$715 21
Gross income	$6,397 13
Gross expense	2,304 43
Net income	$4,092 70
Amount overdrawn Jan. 1, 1889	$830 75
Amount drawn in 1889	6,301 71
Total amount drawn	$7,132 46
Net income	4,092 70
Amount overdrawn Jan. 1, 1890	$3,039 76

Statement Showing Individual Account of Each Heir for 1889.

Gross income for 1889	$6,397 13
Gross expenses for 1889	2,304 43
Net income for 1889	$4,092 70
One-half of net income, or C. B. Hanna's share	$2,046 35
One-third of one-half net income, or each child's share	$682 11

C. B. Hanna:

Amount overdrawn Jan. 1, 1889	$450 40
Amount advanced during 1889	4,276 50
Total amount drawn	$4,726 90
By amount his share net income	2,046 35
Amount now overdrawn	$2,680 55

180 Hattie Whitaker:

Amount overdrawn Jan. 1, 1889	$1,141 51
Amount advanced during 1889	580 00
Total amount drawn	$1,721 51
By her share net income	682 12
Amount now overdrawn	$1,039 39

Mary Whitaker:

Amount to her credit Jan. 1, 1889	$91 48
Her share net income	682 12
Gross amount to her credit	$773 60
Amount advanced during 1889	730 00
To her credit now	$43 60

Robert Whitaker:

Amount to his credit Jan. 1, 1889	$669 66
By his share net income	682 11
Gross amount to his credit	$1,351 77
Amount drawn in 1889	715 21
Amount now to his credit	$636 56

Detailed Income Account, 1889.

Jan. 22.	Rent from Prospect-street homestead	$100 00
" 22.	" " "	100 00
" 22.	Dividend on money in society for savings	1 14
M'ch 5.	3 % dividend on Union Steel Crew Co. stock	636 00
" 25.	Rent from Prospect-street homestead	100 00
" 30.	Dividend on P. W. & K. R'y Co. stock	342 00
" 30.	Interest on W. C. Boyle note	93 00
Apr. 22.	" " G. R. & I. bonds	70 00
May 7.	2 % dividend on Union Steel Screw Co. stock	424 00
J'ne 30.	Interest for one year on note of R. V. Hampson	180 00
July 3.	3 % dividend on Union Steel Screw Co. stock	636 00
Aug. 7.	Rent from Superior-street house	42 58
" 27.	Interest on note Ideal Plow Co.	15 00

Sept.	4.	3 % dividend on Union Steel Screw Co. stock..	636	00
"	23.	Interest on G. R. & I. bonds.....	70	00
"	28.	Rent from Superior-street property.....	110	00
Oct	1.	3 % dividend on P. W. & K. R'y Co. stock....	342	00
"	3.	Interest on J. E. Davidson note.....	72	00
"	7.	" " W. C. Boyle note.....	93	00
"	7.	Rent from barn on Superior-street property...	10	00
"	7.	" " house " " " " ...	50	00
Nov.	1.	Interest on various deposits in Farmers' National bank.....	45	48
"	1.	4 % dividend on Union Steel Screw Co. stock..	848	00
"	5.	Rent from Superior-street property.....	170	00
		Amount of income to November 20, 1889.....	$5,186	20
Dec.	6.	Rent from Superior-street property.....	$110	00
"	10.	Interest on $5,000 deposited with Farmers' National bank.....	234	17
"	24.	4 % dividend on stock in Union Steel Screw Co..	848	00
"	28.	Interest on money borrowed to settle Mrs. E. C. Ford note.....	18	76
		Amount income from Nov. 20, 1889, to Dec. 31, 1889.....	1,210	93
		Total income 1889	$6,397	13
		Gross income for whole year..... $6,397 13		
		" expenses " " 2,304 43		
		Net income.....2) 4,092 70		
		Hanna share for 1889..... ....3) 2,046 35		
		Whitaker " " 682 11		
		Gross income for period Nov. 20 to Dec. 31, 1889.....	$1,210	93
		" expenses " " "	487	14
		Net income for period Nov. 20 to Dec. 31, 1889..2)	723	79
181		One-half net income or C. B. H's share.....3)	361	89
		One-third of one-half of net income or each child's share	120	63

Expense Account, 1889.

Jan.	7.	Paid D. H. Kimberly Cuy. Co. taxes	$22	70
Feb.	1.	" interest on note to Farmers' National bank.....	86	25
"	1.	" interest on note to Farmers' National bank	12	87
M'ch	8.	" J. B. Campbell repairing Cleveland house	12	30
"	30.	" various expense bills shown by voucher 4	85	81
Apr.	11.	" repairs at Prospect street.....	8	88
May	29.	" painting Euclid ave.....	110	00
"	29.	" fence " "	15	88
J'ne	17.	" taxes Cuy. Co.....	461	99

July	1.	Paid	repairs, etc	9 57
"	17.	"	Vantine services in real-estate deal	307 00
Aug.	13.	"	insurance	54 00
Sept.	19.	"	repairs, etc	6 90
"	28.	"	Cowles' commission	5 50
Oct.	9.	"	interest Rawson note	600 00
"	11.	"	plastering	2 50
"	11.	"	painting	27 64
"	11.	"	special police	9 00
"	11.	"	battery	2 00
"	11.	"	Cowles' commission	3 00
Nov.	5.	"	" "	8 50
"	7.	"	taxes Mo. land	9 00
"	18.	"	insurance	6 00
			Amount expense to Nov. 20, 1889	$1,867 29
Nov.	21.	Paid	interest on note to Farmers' National	40 86
Dec.	6.	"	Cowles' commission	5 50
"	16.	"	taxes	49 68
"	16.	"	"	357 97
"	16.	"	"	5 43
"	16.	"	"	5 15
"	31.	"	various expenses	22 55
			Gross expenses 1889	$2,354 43
			Less error made in 1887	$50 00
				$2,304 43
			Amount expenses Nov. 20, 1889, to Dec. 31, 1889.	$487 14

EXHIBIT "B," EXAMINATION OF H. G. OLIPHANT, APRIL 12, 1892.

Gross income for 1890 ..... $11,038 95

C. B. Hanna:

Jan.	29.	Amount advanced		50 00
Feb.	10.	"	"	50 00
Apr.	1.	"	"	300 00
Apr.	17.	"	"	100 00
May	9.	"	"	300 00
June	5.	"	"	300 00
"	27.	"	"	50 00
"	30.	"	"	300 00
July	26.	"	"	50 00
Aug.	12.	"	"	50 00
Oct.	1.	"	"	300 00
"	27.	"	"	150 00
Nov.	18.	"	"	93 00
Dec.	6.	"	"	50 00
"	11.	"	"	75 00
"	31.	"	"	300 00
			Total amount advanced in 1890	$2,518 00

Hattie Whitaker:

Various sums advanced at various times during 1890...	$452 50

182 Mary Whitaker:

Various sums advanced at various times during 1890...	855 00

Robert Whitaker:

Various sums advanced at various times during 1890..	820 68
C. B. H.	$2,518 00
H. W.	452 50
M. W.	857 00
R. W.	820 68
Total amount advanced to heirs in 1890.	$4,646 18
Gross income	$11,038 95
Gross expense	2,477 87
Net income	$8,561 08

Statement Showing Individual Account of Each Heir.

	1890.
Gross income for 1890	$11,038 95
" expenses " "	2,477 87
Net income for 1890	$8,561 08
One-half of net income or C. B. Hanna's share	$4,280 54
One-third of one-half of net income or each child's share	1,426 84

C. B. Hanna:

Amount overdrawn January 1, 1890	$2,680 55
" advanced during 1890	2,518 00
Total amount drawn	5,198 55
By amount his share net income	4,880 54
Amount overdrawn	918 01

Hattie Whitaker:

Amount overdrawn January 1, 1890	$1,039 39
" advanced during 1890	452 50
Total amount drawn	$1,491 89
By her share net income	1,426 85
Amount now overdrawn Jan. 1, 1892	65 04

Mary Whitaker:

Amount to her credit January 1, 1890	43 60
Her share of net income	1,426 85
Gross amount to her credit	$1,470 45
Amount drawn during 1890	855 00
Amount to her credit	$615 45

Robert Whitaker:

Amount to his credit January 1, 1890	$636 56
By his share of net income	1,426 84
Gross amount to his credit	$2,063 40
Amount drawn in 1890	820 68
Amount to his credit	$1,242 72

Detailed Income Account, 1890.

1890.			
Jan.	11.	Rent from Superior-street property	$110 00
Feb.	7.	Rent from Superior-street property	110 00
"	11.	Interest on Ideal Plow Co. note	15 00
Mar.	1.	Interest on R. V. Hampson note	165 00
"	3.	Dividend on stock in Union Steel Screw Co.	636 00
	Mar. 15.	Rent from Superior-street property	110 00
183			
April	1.	Profit from P. W. & K. deal	2,150 00
"	1.	Dividend on stock in P. W. & K. R'y Co.	342 00
"	1.	Dividend on stock in Chartiers R'y Co.	125 00
"	1.	Interest on W. C. Boyle note	93 00
"	4.	Rent from Superior-street property	118 00
"	4.	Dividend on stock in Union Steel Screw Co.	636 00
"	10.	Interest on G. R. & I. bonds	70 00
May	5.	Interest on loan to G. R. & I. Co.	105 00
"	7.	Dividend on stock in Union Steel Screw Co.	848 00
"	14.	Rent from Superior-street property	118 00
June	28.	Rent from Superior-street property	118 00
July	3.	Dividend on stock in Union Steel Screw Co.	848 00
"	16.	Rent from Superior-street property	118 00
Aug.	1.	Interest on Jno. E. Davidson note	36 00
"	1.	Sale P. W. & K. scrip dividend	18 00
"	18.	Rent from Superior-street property	118 00
"	30.	Dividend on stock in Union Steel Screw Co.	848 00
Sept.	13.	Interest on Ideal Plow Co. note	15 00
"	22.	Rent from Superior-street property	118 00
"	27.	Interest on J. J. Brooks note	51 25

Oct.	4.	Interest on G. R. & I. bonds	70 00
"	4.	Dividend on stock in Chartier- R'y Co.	300 00
"	24.	Rent from Superior-street property	118 00
"	30.	Dividend on stock in Union Steel Screw Co.	1,060 00
Nov.	17.	Interest on W. C. Boyle note	93 00
"	18.	Rent from Superior-street property	118 00
Dec.	13.	Interest on C. F. Brooks note	62 70
"	16.	Rent from Superior-street property	118 00
"	30.	Dividend on stock in Union Steel Screw Co.	1,060 00
		Gross income	$11,038 95
		Expenses	2,477 87
		Net income .....2)	8,561 08
		Hanna share .....3)	4,280 54
		Whitaker share	1,426 84

Expense Account, 1890.

1890.			
Jan.	11.	Commission to Cowles	$5 50
"	13.	M. L. Young insurance	20 00
Feb.	7.	Commission to Cowles	5 50
Mar.	1.	Interest Farmers' National Bank note, January 3, 1890	11 87
"	15.	Commission to Cowles	5 50
"	17.	F. D. Ramsey fee *in re* title Ill. land	15 00
"	24.	F. D. Ramsey cost of abstract Ill. land	12 42
Apr.	4.	Commission to Cowles	5 90
"	9.	Interest on Rawson note	600 00
"	15.	M. L. Young insurance	45 00
"	23.	O. A. Oliver cost of exchange draft Ill. land	1 00
May	3.	Interest Farmers' National Bank note March 4, 1890	26 85
"	3.	Interest Farmers' National Bank note April 10, 1890	17 50
"	3.	Interest Farmers' National Bank note April 18, 1890	1 25
"	14.	Commission to Cowles	5 90
J'ne	16.	Taxes on -leveland property	357 97
"	28.	Commission to Cowles	5 90
July	2.	Charles D. Wade glazing Euclid-avenue house,	10 50
"	16.	T. M. Gorsuch fixing tin roof Superior-street house	30 00
"	16.	F. Clifford fixing tin roof Superior-street house,	6 00
"	16.	Commission to Cowles	5 90
Aug.	8.	" " "	5 90
Sept.	4.	Interest Farmers' National Bank note, July 19, 1890	13 08
"	5.	Interest Farmers' National Bank note, August 1, 1890	21 33
"	22.	Commission to Cowles	5 90

Oct.	1.	W. H. Aylard painting, etc., Euclid-ave. house,	63 12
"	4.	H. L. Hanna to settle plumbing bill.....	15 63
"	24.	Commission to Cowles.....	5 90
Nov.	1.	Interest Farmers' National Bank note September 6, 1890.....	6 39
"	1.	Interest Farmers' National Bank note October 4, 1890.....	7 50
"	5.	Interest on Rawson note.....	600 00
"	17.	Taxes, comm'n and survey Missouri land....	16 20
"	18.	Commission to Cowles.....	5 90
Dec.	10.	Taxes 1890 Hocking county, Ohio, land.....	55 70
"	10.	" " Cuyah'ga " " property..	407 50
"	11.	Day and Heaton comm'n sale G. R. & I. bonds,	2 50
"	13.	Interest Farmers' National Bank note Nov. 1, 1890.....	14 28
"	16.	Commission to Cowles.....	5 90
"	18.	Taxes 1890 Marquette county, Mich., land...	5 54
"	18.	" " Houghton " " " ...	4 21
"	31.	H. L. Hanna repairing Euclid-ave. house....	19 93
		Total.....	$2,477 87

184 EXHIBIT "C," EXAMINATION OF H. G. OLIPHANT, APRIL 12, 1892.

C. B. Hanna:

1891.			
Mar.	3.	Amount advanced.....	$50 00
Apr.	1.	" "	50 00
"	1.	" "	300 00
"	30.	" "	50 00
June	2.	" "	50 00
"	30.	" "	50 00
"	30.	" "	300 00
Aug.	14.	" "	50 00
		Amount advanced to C. B. Hanna from January 1 to September 1, 1891...	$900 00
Sept.	14.	Amount advanced.....	50 00
"	30.	" "	50 00
"	30.	" "	300 00
Oct.	30.	" "	50 00
Dec.	1.	" "	50 00
"	10.	" "	50 00
"	31.	" "	50 00
		Total amount advanced in 1891 to C. B. H.	$1,500 00

Hattie Whitaker:

Amount advanced her at various times from January 1 to September 1, 1891..... $1,515 00

(Nothing advanced her after September 1, 1891.)

Mary Whitaker:

Amount advanced her at various times from January 1 to September 1, 1891		$1,078 00
Amount advanced her at various times from September 1 to December 31, 1891		130 00
Total amount advanced to Mary Whitaker in 1891		$1,208 00

Robert Whitaker:

Amount advanced at various times from January 1 to September 1, 1891		$646 12
Amount advanced at various times from September 1 to December 31, 1891		465 55
Total amount advanced to Robert Whitaker in 1891,		$1,111 67

Gross income to September 1, 1891	$6,021 28		This statement is from January 1 to September 1, 1891.
" expenses " "	1,842 00		
Net income	$4,179 28		
Amount not drawn January 1, 1891	875 24		
Total amount to income September 1, 1891	$5,054 42		
Amount advanced in 1891 up to September 1	4,139 12		
Amount not drawn September 1, 1891	$915 30		
Gross income for 1891	$8,475 28		This statement is for whole year, 1891.
" expenses "	2,636 09		
Net income	$5,639 19		
Amount not drawn January 1, 1891	875 14		
Amount income in 1891	$6,714 33		
Amount advanced in 1891	5,334 67		
Amount overdrawn January 1, 1892	$1,379 66		

185 Statement showing individual account of each heir for two periods, viz., from Jan. 1 to Sept. 1, 1891, and from Jan. 1 to Dec. 31, 1891.

	Jan. 1 to Sept. 1, 1891.	Jan. 1 to Dec. 31, 1891.
Gross income	$6,021 28	$8,475 28
Gross expenses	1,842 00	2,636 00
Net income	$4,179 28	$5,839 28
One-half of net income, or C. B. Hanna's share.	$2,089 64	$2,919 59
One-third of one-half net income, or each child's share	$696 54	$973 20
C. B. Hanna:		
Amount overdrawn Jan. 1, 1891	$918 01	$918 01
Amount advanced during period	900 00	1,500 00
Total amount drawn	$1,818 01	$2,418 01
His share net income	2,089 64	2,919 59
Amount to his credit at end of period.	$271 63	$501 58
Hattie Whitaker:		
Amount overdrawn Jan. 1, 1891	$65 04	$65 04
Amount advanced during period	1,515 00	1,515 00
Total amount drawn	$1,580 04	$1,580 04
Her share net income	696 50	973 20
Amount overdrawn at end of period.	$883 50	$606 84
Mary Whitaker:		
Amount to her credit Jan. 1, 1891	$615 45	$615 45
Her share of net income	696 54	973 20
Gross amount to her credit	$1,311 99	$1,588 65
Amount advanced in period	1,078 00	1,208 00
Amount to her credit at end of period.	$233 99	$380 65
Robert Whitaker:		
Amount to his credit Jan. 1, 1891	$1,242 72	$1,242 72
His share net income	696 54	973 20
Gross amount to his credit	$1,939 29	$2,215 92
Amount advanced in period	646 12	1,111 67
Amount to his credit at end of period	$1,293 17	$1,104 25

Detailed Income Account, 1891.

1891.			
Jan.	8.	Interest on Monsarrat note	$150 00
Feb.	12.	Rent from Superior-street property	218 00
"	25.	Dividend on Union Steel Screw Co. stock	636 00
Mar.	7.	Interest on Ideal Plow Co. note	15 00
"	12.	Rent from Superior-street property	136 00
Apr.	1.	Dividend on Chartiers R'y Co. stock	350 00
"	7.	Interest on H. C. Boyle note	96 00
"	7.	" Monsarrat note	150 00
"	7.	" Ideal Plow Co. note	2 50
"	4.	" Hurd Coal and Iron Co. note	377 00
"	10.	Rent from Superior-street property	118 00
"	10.	Interest on O. A. Oliver note	11 75
"	16.	Dividend on Union Steel Screw Co. stock	636 00
May	23.	Interest on C. T. Brooks note	27 00
"	23.	" J. J. Brooks note	116 00
"	30.	Rent from Superior-street property	120 00
June	18.	" " " "	120 00
"	30.	Dividend on Union Steel Screw Co. stock	636 00
July	2.	Interest on J. J. Brooks note, dated Jan. 22, 1889	305 41
"	2.	" " " " Nov. 8, 1888.	149 27
"	17.	Rent from Superior-street property	120 00
"	17.	Interest on Sigler note	30 00
"	17.	" " "	138 96
186			
Aug.	14.	Rent from Superior-street property	120 00
"	14.	Interest on J. J. Brooks note, May 17, 1890	33 75
"	14.	" " " April 18, 1890	52 00
"	14.	" " " Nov. 8, 1888	76 59
"	14.	" " " Jan. 22, 1889	421 41
"	14.	Interest on C. T. Brooks note, Oct. 25, 1889	22 64
"	14.	Dividend on Union Steel Screw Co. stock	636 00
		Amount of income to Sept. 1, 1891	$6,021 28
Sep.	8.	Rent from Superior-street property	120 00
"	29.	Interest on Blair note	90 00
Oct.	3.	Dividend on Chartiers R'y Co. stock	400 00
"	27.	Dividend on Union Steel Screw Co. stock	636 00
Nov.	4.	Rent from Superior-street property	120 00
"	23.	" " " "	100 00
Dec.	1.	Dividend on P. C. C. & St. L. R'y Co. stock	232 00
"	10.	Rent from Superior-street property	120 00
"	29.	Dividend on Union Steel Screw Co. stock	636 00
		Total	$8,475 28

Expense Account, 1891.

1891.			
Feb.	12.	Interest Farmers' National bank, note, Jan. 1, 1891	$2 00
"	12.	Commission to Cowles	10 90
"	12.	W. J. Smith, repairing roof Superior-street property	16 00
Mar.	12.	Commission to Cowles	6 80
Apr.	10.	" "	5 90
"	10.	Interest note of Cowles to Rawson, $20,000	600 00
"	14.	Repairs done at No. 1753	250 00
"	16.	Discount on note to First National bank	42 00
"	17.	Fee for recording release Cowles mortgage	1 25
"	17.	Discount on note $610 to State National bank	7 75
May	20.	Commission to Cowles	6 10
"	20.	W. J. Smith, repairing roof Superior-street property	7 29
J-ne	10.	Taxes, 1890, Euclid-avenue property	123 23
"	10.	Taxes, 1890, Superior-street property	262 46
"	17.	J. B. Campbell, repa-rs at No. 1753	43 20
"	18.	Interest First National Bank note	42 00
"	18.	Commission on rents	6 00
"	19.	Discount on note to State National bank	12 25
July	3.	Repairing, painting, etc., at 1753 Euclid avenue	384 87
"	17.	Commission to Cowles	6 00
Aug.	14.	" "	6 00
		Amount of expense to Sep. 1st	$1,842 00
Sep.	18.	Commission to Cowles	6 00
"	18.	Taxes, 1891, on Missouri land	9 00
Oct.	18.	Plumbing done at Euclid-avenue property	18 67
Nov.	4.	Commission to Cowles	6 00
"	17.	Coal bill Euclid-avenue house, charged to G. E.	52 50
"	23.	Commission to Cowles	5 00
Dec.	10.	" "	6 00
"	14.	Taxes, 1891, on Hocking County land	94 72
"	15.	Taxes, 1891, on Marquette County, Mich., land	7 17
"	21.	Taxes, 1891, on Houghton County land	3 39
"	21.	Taxes, 1891, on Cuyahoga County property	585 64
		Total	$2,636 09

EXHIBIT "D 2," 1892, DETAILED INCOME ACCOUNT FROM JANUARY 1, TO MARCH 31, 1892.

1892.			
Jan.	8.	Rent from Superior-street property	$120 00
"	14.	Interest on note of Christ church, Dayton	60 00
"	26.	Dividend on Union Steel Screw Co. stock	636 00
Feb.	11.	Rent from Superior-street property	120 00
Mar.	4.	Interest on note of Craig W. Cook	10 20
"	4.	Dividend on Union Steel Screw Co. stock	636 00

Mar.	7.	Rent from Superior-street property.....	120 00
"	28.	Interest on note of J. J. Brooks.....	232 00
		Total amount of income for that period...	$1,934 20

187 *Income Statement from Jan. 1, 1892, to March 3, 1892.*

C. B. Hanna:

1892.			
Jan.	1.	Amount advanced.....	$300 00
Feb.	2.	Amount advanced.....	50 00
Mar.	4.	Amount advanced.....	50 00
		Total amount advanced 1892 to March 31.	$400 00

Mary Whitaker:

Jan.	1.	Amount advanced	$75 00
"	1.	Amount boarding.....	65 00
Feb.	12.	Amount advanced.....	300 00
		Total amount advanced 1892 to March 31.	$440 00

Robert Whitaker:

Jan.	12.	Amount advanced book account, etc.....	$96 72
"	19.	Tuition	213 58
"	22.	Amount paid for clothing.....	66 70
		Total amount advanced to March 31.....	$377 00

Gross income for period.....	$1,934 20
Expense account for period.....	49 59
Net income.....	$1,884 61
Amount not drawn Jan. 1, 1892.....	1,379 66
Gross amount due heirs.....	$3,264 27
Gross amount drawn in period.....	1,217 00
Amount not drawn March 31, 1892.....	$2,047 27

Expense Account from Jan. 1, 1892, to March 31, 1892.

1892.			
Jan.	8.	Commission on rents paid to J. G. W. Cowles....	$6 00
"	12.	Paid Dorman & Co., repairing furnace No. 1753 Euclid avenue.....	12 80
"	12.	Paid Towson & Gimbert, repairing roof No. 1753 Euclid avenue.....	11 41
"	16.	Stevenson & Foster, printing vouchers...	3 75
Feb.	11.	Commission on rents collected by J. G. W. Cowles..	6 00
"	29.	Paid H. G. Oliphant, expense of trip to Cleveland, telegrams, etc.....	3 63
Mar.	7.	Paid Cowles as commission on rents collected....	6 00
		Total amount expense for that period.....	$49 59

Statement Showing Undivided Account of Each Heir for Period from Jan. 1 to March 31, 1892.

Gross income for period	$1,934 20
Expense account for period	49 59
Net income for period	$1,884 61
One-half net income, or C. B. Hanna's share	$942 30
One-third of one-half of income, or each child's share	314 10
C. B. Hanna:	
Amount to his credit Jan. 1, 1892	$501 58
His share of net income	942 30
Gross amount to his credit March 31, 1892	$1,443 88
Amount drawn in period	400 00
Amount now to his credit, March 31, 1892	$1,043 88
Hattie Whitaker:	
Amount overdrawn Jan. 1, 1892	$606 84
Her share net income for period	314 10
Amount overdrawn March 31, 1892	$292 74
Mary Whitaker:	
Amount to her credit, Jan. 1, 1892	$380 65
Her share net income	314 10
Gross amount to her credit March 31, 1892	$694 75
Amount drawn in period	440 00
Amount now to her credit, March 31, 1892	$254 75
Robert Whitaker:	
Amount to his credit, Jan. 1, 1892	$1,104 25
His share net income	314 10
Gross amount to his credit	$1,418 35
Amount drawn in period	377 00
Amount to his credit March 31, 1892	$1,041 35

Appraisal of Personal Property Belonging to Estate of Robert Hanna, Deceased, as per Inventory on File in Probate Court.

	Par value.	Appraised value.
Union Steel Screw Co.	$17,000 00	$25,500 00
Ohio National bank	23,100 00	27,720 00
Lake Shore & Tus. Valley Railroad Co.	1,000 00	
Chippewa Mining Co.	12,500 00	
" " "	12,500 00	
" " "	12,500 00	
" " "	2,500 00	
" " "	2,500 00	
" " "	11,250 00	
Sun Fire Insurance Co.	100 00	
West Hickory Oil and Mining Co.	32,750 00	327 50
Hickory Farm Oil Co.	16,435 00	164 35
C. G. Hussey Pacific Gold and Quartz Mining Co.		
Resolute Fire Insurance Co. one-half interest	10 00	
Lorillard Fire Insurance Co. invested profits	20 00	
Lorillard Fire Steel Mining Co.		
" " " " "		
Detroit, Michigan Leonard Hanna, H. Garretson, Joint owners. — North American Mining Co.		
Detroit, Michigan Leonard Hanna, H. Garretson, Joint owners. — North American Mining Co. one-half interest		
Detroit, Michigan Leonard Hanna, H. Garretson, Joint owners. — North American Mining Co. one-half interest in each		
Ohio Mining Co. one-third interest		
Erie Mining Co.	2,500 00	
Hanna, Garretson & Co., Erie Mining Co. one-third interest	1,000 00	
Hanna, Garretson & Co., Erie Mining Co. one-third interest	2,500 00	
F. Brown, Solon Burgess — Continental Imp. Co.	750 00	75 00
F. Brown, Solon Burgess — Cleveland & Sierra Hydraulic *Mled*	12,500 00	1,250 00
Cleveland & Sierra Hydraulic *Mled*	11,500 00	1,250 00
Hanna Gold Mining Co.	15,500 00	700 00
Standard Oil Paint Co.		
Ohio Trap Mining Co. (certificate not found)		

Notes:		
Fred'k Leach, Jr	3,000 00	
W. H. Collins	30 00	
H. C. Brainard	261 31	
A. B. McNairy and G. H. Hessin	10,000 00	10,000 00
Cherry Valley Iron Co., three notes	1,480 86	
Chas. H. Frickes	1,000 00	
" " "	100 00	
Tryphena Nichols	50 00	
R. A. Hapgood	25 00	
F. Leach, Jr., def't on R. H.	150 00	

189 Interest in old assets Ohio National bank:

Originally	$5,766 66		
Three payments	576 67 cash		1,100 00
Gratiot Mining Co.			
Cherry Valley Iron Co. 4 bonds	$1,000 00 each	4,000 00	
Cherry Valley Iron Co. 1 bond	500 00 "	500 00	
Cherry Valley Iron Co. 3 bonds	100 00 "	300 00	
Cherry Valley Iron Co. 5 notes	48 08 "	240 00	
			$68,086 85
Latonia Iron & Coal Co., 1 note		$5,000 00	2,500 00
C. B. Hanna, from note		200 00	
" " " "		300 00	
" " s. d'ft		5,000 00	
" " prom. note		16,000 00	
C. C. Davidson s. d'ft *or* C. B. H. p'd by R. H.		1,000 00	
C. C. Davidson s. d'ft *or* C. B. H. p'd by R. H.		1,000 00	
C. B. Hanna prom. note order Stebbins, Post & Co.		8,100 00	
C. B. and H. L. Hanna prom. note		8,000 00	
Interest in Citizens' Savings & Loan Ass'n		6 33	6 33
Osage Mining Co.		25,000 00	

(Signed) W. S. JONES.
JOHN McCLYMONDS.
SOLON BURGESS.

Which said master's report had the following endorsement thereon: No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Amended and supplemental report of Irvin Belford, special master. Filed May 4, 1892, clerk.

Exceptions of J. Twing Brooks to Supplemental Report.

Afterwards, to wit, on June 3, 1892, exceptions were filed herein, which exceptions read, and are in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

F. A. Raynolds, Complainant, *vs.* Cassius B. Hanna *et al.*, Defendants.) Exceptions to Amendment or Addition to Former Report.

The defendant J. Twing Brooks, executor and trustee of the estate of Robert Hanna, deceased, excepts to the additional report of the special master, filed May 4, 1892, for the reason that there is not sufficient evidence to sustain such findings or either of them:

1. This defendant excepts to the special master's findings,
190 that the total income from November 20, 1889, to March 31, 1892, was $28,814.21, and that one-half thereof, to wit, $14,407.10, belonged to said Cassius B. Hanna or C. B. Hanna and his family.

2. This defendant excepts to the finding, that this last sum the executor had retained and invested $7,612.60 of said sum of $14,407.10 before found as the whole income for that period.

3. This defendant excepts to all that part or parts of said amendment which finds and treats the royalty from coal lands as income and not as capital, as done by the executor.

4. This defendant excepts to the finding, that the present net income of said estate is $11,500.00.

5. This defendant excepts to the finding, that any portion of the income prior to November 20, 1889, was by the executor retained and invested for the benefit of the beneficiaries.

6. This defendant excepts to the finding, that out of the one-half of the net income, prior to November 20, 1889, the executor retained and invested $9,795.69, because he says that of the net income the executor had in fact overpaid said C. B. Hanna and family, their full one-half, and they were in fact, indebted to him for that period.

7. The exceptions filed February 8, 1892, to former or original report, to remain and to be in force, unless to any extent modified hereby.

Endorsed: No. 4743. In United States circuit court, F. A. Raynolds, plaintiff, *vs.* Cassius B. Hanna *et al.*, defendant-. Exceptions to amendment or addition to former report. Filed June 3, 1892 Irvin Belford, clerk United States circuit court.

Continuance.

Afterwards, to wit, at the April, A. D. 1892 term of this
191 court, to wit, on September 24, 1892, this cause was continued to the next term of this court.

Hearing on Exceptions.

Afterwards, at the October, A. D. 1892 term of this court, to wit, on November 16, 1892, an order was made and entered herein, which order reads, and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } Equity. No. 4743.

The hearing upon the exceptions to the master's report herein, is set for hearing before Judge Jackson at Nashville, Tenn., on the sixth day of December, A. D. 1892, when counsel may be heard either orally or upon briefs.

Decree.

Afterwards, to wit, at the February, A. D. 1893 term of this court, to wit, on February 18, 1893, a decree was entered herein, which decree reads, and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee.

This cause came on to be heard upon exceptions to the master's report, and upon the master's report, and upon the pleadings filed in said cause, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz: that all of the defendants have been duly and lawfully served with process herein; that all and singular, the exceptions to the report and amended and supplemental report of the master appointed herein, are disallowed and overruled; that the in-
192 terest of the defendant, Cassius B. Hanna, in the estate of Robert Hanna, deceased, is one-fourth of the net annual income arising therefrom, and that such interest is subject, and is hereby subjected to the payment of the judgment of the complainant set forth in his bill of complaint, which is found to be, including interest to the date of the rendition of this decree, $57,929.72; that there is now due and payable to said complainant from the defendant, J. Twing Brooks, trustee, on account of said Cassius B. Hanna's interest in such estate, accummulated up to the thirty-first day of March, A. D. 1892, the sum of $11,755.66, which said sum, said J. T. Brooks, trustee, is ordered and directed to pay to the complainant or his attorneys of record within thirty days from the entry of

this decree, and in default thereof, execution may issue as upon judgment at law.

The amount, $11,755.66, which the defendant, Brooks, is ordered to pay, is ascertained as follows:

From September 9, 1885, to March 31, 1892, is a period of six years, six months and twenty-two days, and the accumulation of royalties or rentals from the coal mine at the rate of $5,000.00 per year during that time would be $32,777.88. The amount of income exclusive of royalties, found by the master to have accumulated on the thirty-first day of March, 1892, is $17,008.67. The sum of these two amounts is $49,786.55.

One-fourth of this amount is $12,446.64. There is deducted from this $690.95 overdraft of Cassius Hanna on his income account.

It is further ordered and decreed, that one-fourth of the net annual income of the estate of Robert Hanna, deceased, including the rent and royalty from the lease of coal land made by defendant, Brooks, trustee, to the Hocking Coal and Iron Company, and from all other sources that may have been received since March 31, A. D. 1892, and that shall thereafter be collected and
193 received by the trustee of said estate, shall, as received and collected, be paid over to complainant or his attorneys of record, on and towards the satisfaction of the complainant's judgment and interest thereon, until it is discharged or until the final division of the estate, among the testator's grandchildren as provided by the will.

The costs of this cause, including an allowance of $600.00 to Irvin Belford, special master, heretofore appointed herein, shall be divided between the complainant and the defendant J. Twing Brooks, trustee, each being taxed with one-half thereof.

And the defendant, J. Twing Brooks, trustee, having given notice of his intention to appeal this cause, the court do allow such, and do fix the amount of the undertaking for such appeal at the sum of one thousand dollars.

Petition for Appeal and Assignment of Errors.

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee.

And now comes the above-named J. Twing Brooks, trustee and executor of the last will and testament of Robert Hanna, deceased, one of the defendants herein, and conceiving himself aggrieved by the final order, judgment and decree of this court, entered on the eighteenth day of February, A. D. 1893, in the above-entitled cause, doth hereby appeal therefrom to the circuit court of appeals for the

sixth circuit of the United States. And for assignments of error and ground of complaint against said decree, says:

194 1. That the court erred in said decree, in the construction and interpretation given by it, the said court, to the last will and testament of the said Robert Hanna, deceased, in finding, as a matter of law and fact, that the said Cassius B. Hanna had a vested interest in the income derived from the estate of the said Robert Hanna, deceased, which vested interest could be reached in this action, by the plaintiff herein.

2. That said court erred in the construction and interpretation given to the last will and testament of the said Robert Hanna, deceased, a copy of which is attached to the answer of this respondent herein, in finding that it was not the intention of the said testator, Robert Hanna, by said will, to vest in this respondent, the said J. Twing Brooks, the sole discretion as to whether or not he should pay any portion of the income derived from the estate of the said Robert Hanna to the said Cassius H. Hanna, and in finding that the said Cassius B. Hanna held, owned or possessed any interest in the estate of the said Robert Hanna, deceased, which could be aliened by him, or transferred to him by others, or reached by his creditors.

3. That the said court erred in its finding, that the interest of the defendant, Cassius B. Hanna, in the estate of Robert Hanna, deceased, was, and is, one-fourth of the net income arising therefrom, and that such interest is subject, and is by said decree subject to the payment of the judgment of complainant set forth in his bill of complaint.

4. That the said court erred in its finding that there is now due and payable to said complainant from the defendant, J. Twing Brooks, trustee, on account of said Cassius B. Hanna's interest in said estate, accumulated up to the thirty-first day of March, A. D. 1893, the sum of $11,755.66, which this respondent is ordered and directed to pay to the complainant or his attorneys of record.

5. That there is error in the said judgment and decree, in

195 ordering that one-fourth of the net annual income of the estate of Robert Hanna, deceased, including the rents and royalty from the lease of coal lands made by this respondent, trustee, to the Hocking Coal and Iron Company, and from all other sources that may be received since March 31, 1892, *and* that shall thereafter and hereafter be collected and received, and be paid over to the complainant or his attorneys of record, on and toward the satisfaction of complainant's judgment, until its discharge, or until the final division of the estate.

6. That there is error in the decree of said court in overruling all and singular the exceptions to the report of the special master appointed herein, and disallowing the same.

7. This respondent also assigns as error in the said decree, the overruling of the court therein, of the exceptions of this respondent, and findings of said special master that the paper-writing, referred to in said report, as a lease of coal lands to the Columbus & Hocking Coal and Iron Company was a lease of said lands, and not a sale of the coal underlying the same, and the finding of the said

master that this respondent, as such executor and trustee, did not sell said coal and lease said lands, and that the money received from said grantee was not purchase-money paid for coal, but was rental, and, therefore, income, and not capital, belonging to said estate.

8. This respondent also assigns for error in said decree, the overruling by the court of the exception of this respondent to the finding of the special master herein, that there has been retained and invested for said C. B. Hanna, by the trustee, the sum of $8,312.51, or any other sum.

9. Respondent also assigns for error, and avers that there is error in said decree and judgment of the court, severally, in overruling each of the several exceptions filed by this respondent to the report of the special master herein, and to the addition to such report thereafter filed by said master.

196 Wherefore, this defendant and appellant appeals from the whole of said decree of said circuit court, and the bill, answer, pleadings, report of the master, depositions, exhibits and evidence, and all the proceedings in said cause may be sent to the circuit court of appeals of the United States, within and for said sixth circuit, without delay, and that the said circuit court of appeals, will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said bill of complaint, with costs, or for such other decree as to the said circuit court of appeals, shall seem just, and ask this court to fix the amount and conditions of an appeal bond for supersedeas and stay of injunction herein.

ESTEP, DICKEY, CARR & GOFF,
Attorneys and Solicitors for J. Twing Brooks, Executor and Trustee, Estate of Robert Hanna, Deceased.

And now, to wit, on the eighteenth day of February, 1892, it is ordered that the appeal be allowed.

AUGUSTUS J. RICKS,
United States Judge.

Which said petition for appeals, and assignment of error, had the following endorsement thereon:

No. 4743. United States circuit court, northern district of Ohio, eastern division. F. A. Raynolds *vs.* C. B. Hanna *et al.* Petition for appeal and assignment of error. Filed February 18, 1893. Irvin Belford, clerk United States circuit court.

Order Allowing Appeal.

Afterwards, at the February, A. D. 1893 term of this court,
197 to wit, on March 4, 1893, an order was made and entered herein, which order reads, and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } No. 4743. In Equity.

This day came the parties in the above-entitled cause, by their attorneys, and the said defendant, J. Twing Brooks, trustee, considering himself aggrieved by the decree of the court in this cause, came, and by his solicitors, presented to the court a petition for the allowance of an appeal to the circuit court of appeals, together with an assignment of errors asserted and intended to be urged in that behalf. On consideration whereof, and it appearing that the defendant, J. Twing Brooks, trustee, has executed and filed herein a proper undertaking in appeal and supersedeas as provided by law, in the sum of ($16,000) sixteen thousand dollars to the acceptance of the court, the court do allow said appeal, and it is ordered that a transcript of the record and proceedings and papers upon which the decree of this court was rendered in this cause, duly authenticated, be sent to the United States circuit court of appeals, according to law in such case provided.

Bond.

Afterwards, to wit, on March 3, 1893, a bond on appeal was filed herein, which bond reads, and is in the words and figures following, to wit:

Know all men by these presents, that we, J. Twing Brooks, trustee, as principal, and J. Twing Brooks, as sureties, are held and firmly bound unto F. A. Raynolds in the full and just sum of sixteen thousand dollars, to be paid to the said F. A. Raynolds, his certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

198 Sealed with our seals and dated this — day of March, in the year of our Lord, one thousand eight hundred and ninety-three.

Whereas, lately at a circuit court of the United States for the northern district of Ohio, eastern division, in a suit depending in said court, between said F. A. Raynolds, complainant, and Cassius B. Hanna, Hattie L. Hanna, and J. Twing Brooks, trustee, were respondents, a decree was rendered against the said J. Twing Brooks, trustee, directing him to pay complainant the sum of $11,755.66, one-half the costs of suit, and certain other amounts therein described; and the said J. Twing Brooks, trustee, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said F. A. Raynolds, citing and admonishing him to be, and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the third day of April next.

Now the condition of the above obligation is such, that if the said

J. Twing Brooks, trustee, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of E. S. Beatty, as to J. T. Brooks, H. G. Oliphant.

[SEAL.] J. T. BROOKS,
Executor and Trustee of Robert Hanna, Deceased.
[SEAL.] J. T. BROOKS.
[SEAL.] E. J. ESTEP.
[SEAL.] MOSES R. DICKEY.
[SEAL.] W. F. CARR.
[SEAL.] F. H. GOFF.

Approved by—
AUGUSTUS J. RICKS,
United States District Judge.

199 Endorsed: No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Bond on appeal to the United States circuit court of appeals for the sixth circuit. Filed March 4, 1893. Irvin Belford, clerk.

Citation.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To F. A. Raynolds, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the third day of April next, pursuant to a writ of appeal filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, wherein J. Twing Brooks, trustee, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said writ of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and seventeenth.

AUGUSTUS J. RICKS,
United States District Judge.

We hereby acknowledge service of the within citation.
FRANCIS J. WING,
J. WM. BALL,
Solicitors for F. A. Raynolds.

March 8, 1893.

200 *Opinion of the Court on Demurrer.*

Afterwards, to wit, on December 26, 1890, an opinion of the court on demurrer to answer was filed herein, which opinion reads and is in the words and figures following, to wit:

The Circuit Court of the United States for the Northern District of Ohio.

FRANCIS A. RAYNOLDS
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS. } In Equity.

On demurrer to answer of Brooks, trustee.

This is a bill to subject certain equitable assets of the defendant, Cassius B. Hanna, to the payment of a judgment owned by the plaintiff against Hanna and his wife, upon which execution has been issued and returned unsatisfied. The contention of the plaintiff is that by the last will and testament of Robert Hanna, father of Cassius B. Hanna, the latter acquired certain interests which in equity should be subjected to the payment of this judgment. Defendant, Brooks, is trustee under such will, with power to manage, direct and control the estate, to rent, sell or improve the real estate and to dispose of real and personal property in his judgment, and reinvest the proceeds as he may deem best. The seventh item of the will is as follows:

"I hereby authorize and direct my executor, Brooks, as soon as convenient, after my death, and in case my son Cassius shall so request, to purchase a home for him at a cost not to exceed $12,000, taking title to himself as executor and trustee as aforesaid; the same to be kept as and for a home for Cassius free of rent so long as he desires to occupy the same, and in the final settlement of my estate as hereinafter provided, I direct that the money expended by my
201 executor in insurance, taxes, and the assessments on the house so occupied by Cassius, together with six per cent. interest per annum on the cost of said home, for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid for Cassius or his children, as hereinafter provided; or if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments and interests from the annual income that is to be paid to Cassius or his children, as hereinafter provided, he is hereby authorized and directed so to do." There are certain other provisions set forth in the will that are not necessary here to be noticed.

The bill further avers that in November, 1884, in accordance with the directions contained in the will, Brooks, acting as executor of said estate, at the request of the defendant, Cassius, caused a dwelling-house to be built upon certain lands formerly owned by said Robert Hanna, title to which had passed to said Brooks, as executor

and trustee, under the provisions of said will; that the said house was devoted by said trustee to the use of said Cassius as a home, to be occupied as and for a home to said Cassius free of rent under the terms of the will; that the said house was accepted by him as a fulfillment and performance of the trust created for his benefit by said will, and the said will and the said house and lands have been occupied by him as a home ever since the time of its construction. It further charges, that said Cassius has, by reason of the premises, an equitable life estate in and to said lands and building subject in equity to the payment of said judgment. There is a further averment, that under the provisions of the will the said executor holds the said estate, which amounts to from $150,000 to $200,000, in trust, to pay the said Cassius, or for his benefit, one-half of the net income arising from said estate, and that said Cassius is entitled to receive one-half of the yearly income or increase of said estate; that it has been paid to him by said trustee, from time to time, since
202 the death of his father, and that the future payment of said income is a charge upon the estate and assets in the hands of the trustee. The bill charges that by reason of the premises the plaintiff is entitled to have said equitable life estate and such right to receive one-half of said annual net income, subjected to the payment of the judgment and alleged refusal.

The answer contains a sweeping denial of all the material allegations of the bill. Avers that it is not true that he, Brooks, acting as the executor of said estate, at the request of said defendant, Cassius, caused a dwelling-house to be built upon lands formerly owned by said Robert Hanna, and described in the bill; denies that the house built upon said lands was devoted by the trustee to the use of said Cassius, to be occupied as and for a home by said Cassius, free of rent, under the terms of the will; denies that said house and land and the use thereof were accepted by said Cassius as a home, or were accepted by him as fulfillment and performance of the trust created for his benefit; denies that said house and lands have been occupied by him as a home since the time of its construction; and avers, in explanation, that said Cassius never exercised the option given him by his father's will, to have a separate home purchased or constructed for his own use; that on the contrary, he declined to make a request for a separate home for himself, and gave as a reason therefor, that he could not afford to have deducted from his half of the annual net income of his father's estate six per cent. of the cost thereof, and insurance, taxes and assessments, which were by the will required to be deducted from the half interest that would ultimately pass to his heirs. It further avers, that the property described was owned by Robert Hanna for many years prior to his death, and at the time of his death, and ever since, has been simply treated as part of decedent's estate; that for two or three
203 years following his death, Cassius, his wife and two children, and three children of a deceased daughter, continued to occupy the old Hanna homestead on Prospect street; that during those years the net income of the estate became seriously diminished, at the same time an unusual amount of money was needed

each year to keep the said property in proper condition and pay the necessary compensation to servants, and for the large amount of fuel which was needed to make the house comfortable, and other necessary expenses, and on this account only, and for the sake of being able to provide a comfortable home for all the beneficiaries of the estate, the trustee built the house on the land described, and from the time the same was completed up to the present time, it has been owned and held as a part of the Hanna estate and made use of as a home by the grandchildren of the deceased, by Cassius' wife, and a part of the time, Cassius, himself. That Cassius left Cleveland for the West about three years ago, since which time he has had nothing whatever to do with the real estate, nor personally occupied the same. It further avers that defendant has kept said property insured, paid the taxes and kept up the repairs as an integral part of the estate of said Hanna, deceased, and has kept no separate account of the same; and that the children of his daughter have occupied said estate by permission and sufferance, with the wife of said Cassius and her children; but that the said property has not been in the possession or under the control, in any respect, of the said Cassius for three years last past; that he has no control or right of control over the same; and that the title, interest and the right to control, is wholly in the defendant as executor and trustee.

Now, while the denials of the answer are most of them couched in the language of the bill, and may perhaps be open to the criticism of containing a negative pregnant, still taking them in con-
204 nection with the affirmative or explanatory allegations of the answer, it seems to me that they ought to be regarded as a sufficient denial of the equities of the bill. While it is entirely possible that the court may be able to charge this estate with the payment of the plaintiff's judgment, it would be very unsafe to attempt to frame a decree upon the pleadings as they now stand, but if all the facts were laid before the court, it would be able to determine at once whether the benefit, advantage, or income which Cassius probably has from his father's estate, were such equitable assets as could be appropriated to the payment of this judgment. It seems to me that to enable the court to act intelligently, it will be necessary for testimony to be taken and the amount and character of the assets to be fully ascertained.

An order will be entered overruling the demurrer.

HENRY B. BROWN.

Which said opinion had the following endorsement thereon: No. 4743. United States circuit court, northern district Ohio. In equity. Raynolds *vs.* Hanna. Opinion on demurrer. Filed December 26, 1890. Martin W. Sanders, clerk.

Opinion of the Court, Referring Case to Master.

United States Circuit Court for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA *et al.*, Defendants. } No. 4743. In Equity.

The complainant, as a judgment creditor of defendant, Cassius B. Hanna, having exhausted his remedy at law, files this bill to reach, and subject to the payment of his judgment, the interest of said Cassius B. in the estate of his father, Robert Hanna, de-
205 ceased. By the will of said Robert Hanna, the defendant, Brooks, was made executor and trustee of the testator's estate, and vested with very large discretionary powers as to its control and management in trust for the objects and beneficiaries therein specified. The controverted question in the case is, whether the testator's son, Cassius B., takes any vested equitable interest or right in either the "corpus," or income of said estate, which can be subjected to the payment and satisfaction of the complainant's debt. Without setting out the entire will, it is very clear that the defendant, Brooks, as trustee, holds the estate of the testator, and must exercise the powers conferred upon him by the will only for the benefit of the "*cestui que trust*," who are objects of the testator's bounty. By the eighth item of the will, after directing the application of the income of his estate, first to the payment of certain charges and expenses, the testator says, "I desire the remainder of the yearly income or incomes of my estate that shall be collected and received to be divided into two equal parts; one part to be expended by my said executor for the benefit of my son, Cassius, and his family, so long as he, Cassius, shall live; or in case my said executor shall deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate to my son, Cassius, in cash." After directing the other half of the net income to be held and applied for the benefit of the children of his deceased daughter, Arrial, the testator proceeds: "If, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain, after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild, who would be entitled to it under the foregoing plan of distribution."
206 By the ninth item of the will, the executor is to continue to control and manage the estate, and to distribute and invest the annual income thereof, as above directed, from year to year, until the youngest child of my daughter, Arrial, then living, shall come of age, or until such further period, as in his opinion, the wel-

fare of my son, Cassius, or of my grandchildren will be thereby promoted, and whenever it shall so seem prudent to said executor, but in no event till then." The executor is further directed before making a final distribution of the estate to take an account of advancements made by the testator to his son, Cassius, and his daughter, Arrial, or to her and her children together, and deduct the amount of the excess that may exist from the share of the one receiving same, upon the final distribution of the estate.

By the second item of the codicil, the eighth clause of the will, is modified as follows: "In order to settle definitely, and make forever free from dispute that portion of item eight of said will which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct that the one-half of said yearly net income, which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only, until the time arrives when the final distribution of my estate shall be made under the provisions of said will, and, to this extent, are the words in said will, directing said portion of income to be expended for his benefit, 'So long as he, Cassius, shall live,' to be modified and controlled, also that the one-half of said annual income, which is to be expended for the benefit of said Cassius, as aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my said executor shall deem best, and not
207 otherwise, for the benefit of my son, Cassius, and his family. Also, that any portion of said share of income, which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession, in trust, by my said executor, the same to be expended for Cassius' benefit, or paid to him at such time, and in such amounts, as he, my said executor, may deem best, and not otherwise." Item 3. "Unless my executor shall have sooner made a final distribution of my estate, under the powers granted in my said will, I hereby will and direct such final distribution to be made, as soon as may be after the death of my son, Cassius, provided, at that time, the youngest child of my daughter, Arrial, then living, shall have reached the age of majority."

Item 5. "In the event that my son, Cassius, should have no children living, nor grandchildren living, at the time of the final distribution of my estate, as provided in my said will, I direct my said executor to retain in his own custody and possession, one-half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and, at the death of Cassius, said one-half of my estate, so retained and held, to be by said executor distributed *per stirpes* among the children and grandchildren of my daughter Arrial."

It does not appear from the pleadings (no proof being yet taken in this cause) whether the executor has made any final distribution of the estate, as he was authorized to make by the eighth item; nor whether the youngest living child of the daughter, Arrial, has yet

arrived at majority. By the third item of the codicil, the final distribution (if not already made) was to be made "as soon as may be after the death of my son Cassius, provided, at that time the youngest child of my daughter, Arrial, then living, shall have
208 reached the age of majority." If Cassius had no child or grandchildren living at the time of final distribution, the executor was, by the fifth item of the codicil, "to retain in his custody and possession one-half of the whole estate, as it might then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and, at the death of Cassius, said one-half of my estate, so retained and held, to be by said executor distributed *per stirpes* among the children and grandchildren of my daughter, Arrial."

From the provisions of the will taken together as a whole the testator seems to have intended that his son, Cassius, until the final distribution of the estate, which by the codicil is postponed till after Cassius' death, should be the beneficiary of one-half the net income or incomes arising therefrom—that if any portion of said one-half the net income should not be used or expended for the support of said Cassius, or of himself and family, then the executor was directed "to invest such surplus as may remain after what he deems a reasonable expenditure has been made, for the benefit of the child, or grandchild who would be entitled to it under the foregoing plan of distribution." That is to say, if any portion of the one-half of the net income of the estate was not, or could not be properly and judiciously expended or advanced to Cassius, the surplus should be invested for his benefit. The discretion conferred upon the executor of deciding what part of said one-half of the net income should be advanced to or be expended for said Cassius, or be invested for his benefit in no way affects the beneficiary's right or interest in the trust fund for the direction of the will is, in effect, that so much of the fund as is not turned over to or expended for Cassius, shall be invested for his benefit. It seems clear, therefore, that Cassius took by the will, a vested beneficial interest during his life, or if not during his life, at least until the final distri-
209 bution of the estate in the designated fund, which no discretion conferred upon the executor could deprive him of or defeat. Cassius, as the "*cestui que trust*." of one-half of the net income during life, could compel the executor either to advance to or expend for him said fund, or invest the same for his benefit. It is very certain that the executor himself took no beneficial interest in said one-half of the net income of the estate, nor is there any discretion or authority given him either to apply or invest all or any portion of said fund for the benefit of any other person or persons than Cassius. All the requisites of valid trust exist in his favor. The subject of the trust is sufficiently definite—the object or beneficiary is certain, and the direction of the testator is imperative upon the trustee. In Colton *vs.* Colton, 127 U. S. 300, 310, 316, the testator gave his estate to his wife, and requested her to make such gift and provision for his mother and sister, "as in her

judgment will be best," and it was held that an enforceable trust was created in favor of the mother and sister. The opinion of the court in this case is full and instructive as to the proper rules and principles for the constructions of wills.

There is no provision of the will that the one-half of the net income of the estate which the trustee is to advance or invest for the benefit of Cassius, should terminate upon alienation or cease upon the attempt of creditors to subject it to the payment of his debts. Nor is there any limitation over *of* the fund. While the Supreme Court of the United States and many of the State courts do not follow the English decision to the extent of holding, that no provision can be made by will for a "*cestui que trust.*," that will exempt from liability for his debts in the absence of any limitation over, or direction that it shall cease on insolvency or bankruptcy, there does not
appear to be any relaxation of the settled rule that where an
210 estate or the income thereof, or a definite sum is given to a
trustee for the benefit of a designated object or person for a definite period without qualifying conditions or restrictions, express or implied, such beneficial interest may always be reached and subjected to the payment of the beneficiary's debts. Thus in Broadway National Bank *vs.* Adams, 133 Mass., 170, it was decided that the donor of the income of a trust fund to one for his life might qualify the gift by a provision that the right to receive the income should not be alienable. In Bates *vs.* Brown, 146 Mass., 369, it was held that such a qualifying provision against alienation need not be in express terms, but might be implied, if such intention is clearly to be gathered from the whole instrument. In Broadway National Bank *vs.* Adams, 133 Mass., 170, the gift was of the whole income. In the later case of Marquard *vs.* Cleaves, 149, Mass., 307, the gift was of the whole income for the support of the beneficiary. There is a recognized distinction between a right to so much of a designated trust, estate or fund as shall be needed, in the discretion of a trustee, for a beneficiary's support, and a gift of such estate or fund to a trustee for the support of a beneficiary. Thus, in the recent case of Slattery *vs.* Wason (Mass.), reported in book 7, page 395 of Lawyers' Annotated Reports, it is said by the supreme court of Massachusetts that "when the whole income or a definite sum is given to the beneficiary for his support the whole belongs to him, and the expression of the purpose for which it is given, is not deemed to be the expression of or intention that the right to secure it shall not be alienable, but when the right given is for a support out of a fund which is given to another, the right is in its nature alienable, and the intention of the donor that it shall not be alienated is presumed." The present case falls within the former rather than the latter class. The executor is not the holder or owner of the designated fund other than
as trustee. He cannot withhold the fund or any portion
211 of it from Cassius, nor apply it otherwise than for his support or invest it for his benefit so long as Cassius shall live. The fact that the trustee has a discretion as to what portion of the fund he will turn over to Cassius, for his support, and what portion of the same he will invest for his benefit, in no way impairs Cassius'

beneficial interest or ownership in the entire one-half of the net income for and during the period of his natural life. This interest of Cassius has all the incidents of any other equitable life estate and may be subjected to the payment of his debts. But, as it does not appear what said trust fund amounts to, nor what portion of the one-half of the net income has been invested by the executor for the benefit of said Cassius, a reference to the master is necessary to a final decree. It is accordingly ordered that a reference be and the same is hereby directed to the master to ascertain and report: 1. What the estate of Robert Hanna, deceased, consisted of on November 20, 1889, the date complainant's bill was filed? 2. What has been the net income annually arising therefrom since said date, after paying the taxes and other charges as directed by the eighth item of said will, and what is the present net income of said estate? 3. How or in what manner said net income has been applied or disposed of by the executor, and what portion of the one-half thereof has been advanced to or appropriated towards the support of said Cassius B., or for himself and family, and what portion thereof has been invested for his benefit before and since the twentieth of November, 1889. The master will also ascertain and report when the youngest child of the testator's daughter, Arrial, will arrive at majority, and such other facts as either side may deem material and important in arriving at the question and "quantum" of Cassius' interest in the designated trust fund. The master is authorized to call before him the executor, the defendant, Brooks, and require the production of his books and accounts as such executor and
212 trustee for examination and inspection, touching the matters referred, and will make his report in the premises to the next term of this court. An interlocutory decree in accordance with the foregoing directions for a reference will be entered.

HOWELL E. JACKSON,
Circuit Judge.

June 6, 1891.

Endorsed: No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Opinion of court. Filed June 11, 1891. Irvin Belford, clerk United States circuit court.

Opinion of the Court on Exceptions to Master's Report and on the Merits.

United States Circuit Court for the Northern District of Ohio, Eastern Division.

F. A. Raynolds
vs.
Cassius B. Hanna *et al.*
} No. 4743. In Equity.

Pending on exceptions to report of special master, and upon the final hearing upon the merits.

Before taking up the exceptions of the defendant, Brooks, trustee, to the master's report as amended and filed herein May 4, 1892, it

is proper to consider the question, which is again strenuously urged on behalf of the respondents, whether, under the will of Robert Hanna, deceased, the defendants, Cassius B. Hanna and wife, Hattie L., or either of them, acquired any such beneficial interest or trust estate as can be reached and subjected by complainant to the payment of his judgment against them. The court has heretofore, in an opinion filed herein, June 11, 1891, given a construction to said will, which substantially answered this question in the affirmative, but at the request of counsel for defendants, and in the light of further argument, it has again re-examined the matter, with the result that the
213 views already expressed and conclusions reached are rather confirmed than shaken. By the fourth item of the will the testator divided and bequeathed his entire estate to his executor, defendant, Brooks, "in trust to be disposed of by him as hereinafter provided." The trustee was invested with full, ample and complete power to manage, direct and control the property bequeathed and devised according to his own best judgment and discretion, it being the expressed wish and purpose of the testator, to invest said executor and trustee "with power to manage and control my entire estate, according to his own judgment and discretion, the same as I could do myself, if living," and "subject only to, and be restrained only by the special limitations herein *improved* and expressed by me." Now, among the special limitations imposed and expressed by the testator, to which the executor's discretionary powers of management and control were to be subject, are certain provisions made for the benefit of the testator's son, Cassius B., as for him and his family or children, set out in the seventh and eighth items of the original will, and items 2 and 5 of the codicil, as follows:

"Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son, Cassius, shall so request, to purchase a home for him at a cost not to exceed $12,000, taking title to himself as executor and trustee, as aforesaid. The same to be kept as and for a home for Cassius, free of rent so long as he desires to occupy the same. But in the final settlement of my estate, as hereinafter provided, I direct that the money expended by my executor in insurance, taxes and assessments on the home so occupied by Cassius, together with six per cent. interest per annum on the cost of said home, for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid to Cassius or his children, as is hereinafter provided, or if my said
214 executor shall deem it best to deduct the amount of said annual insurance, taxes and assessments and interest from the annual income that is to be paid to Cassius or his children, as hereinafter provided, he is hereby authorized and directed to do so."

"Item 8. So far as the same is practicable, in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows: First, to the payment of taxes, insurance, assessments and repairs that may be levied, or become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including

the compensation hereinafter provided to be paid to my executor; secondly, to the payment of the annuity of $2,000, hereinbefore provided for my wife, Harriet A. Hanna; thirdly, after the payment of all the items hereinafter mentioned, I desire the remainder of the yearly income or increase of my estate, that shall be collected and received, to be divided into two equal parts, one part to be expended by my said executor for the benefit of my son, Cassius, and his family, so long as he, Cassius, shall live, or in case my said executor shall deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate (subject to the deductions as above provided for taxes, etc.) to my son, Cassius, in cash. The other of said equal parts, into which the net yearly income of my estate is to be divided, as provided in this section, I direct my said executor to expend for the benefit of the children of my deceased daughter, Arrial T. Whitaker, in such manner that each of said children shall have an equal and the same portion with the other. In case any of said children of my daughter, Arrial, should die without issue before the final division of my estate, then the share of the income of my estate of such child or children so dying, shall be divided between the other children of my daughter, Arrial, or
215 the issue of them, they, in such case, to take *per stirpes* and not '*per capita*,' and in case any of the said children of my daughter, Arrial, should die before the final distribution of my estate, leaving issue, I direct, that the share of the income of my estate, which would be coming to such child of Arrial if living, shall be paid to the issue of such child share and share alike, and I hereby authorize my executor to pay in cash, if he shall deem best, the whole or any part of such share of the income of my estate as may be due to each of the children of my daughter, Arrial, as aforesaid. He to take in such case the receipt of the guardian or other person, who for the time being may be charged with the care or custody of said children or either of them for any payments made, and in the expenditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter, Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life, and if, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as remain after what he deems a reasonable expenditure as has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution;" item two of the codicil provides, "in order to settle distinctly and make forever free from dispute that portion of item eight of my said will, which relates to the division and distribution of the annual net income of my estate. I hereby declare it to be my wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of

my son, Cassius, and his family, is to be expended for his
216 benefit only, until the time arrives when the final distribution of my estate shall be made under the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, 'so long as he, Cassius, shall live,' to be modified and controlled; also, that the one-half of said annual income which is to be expended for the benefit of Cassius, aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession, in trust, to the end that the same may be applied as my said executor shall deem best and not otherwise, for the benefit of my son, Cassius, and his family; also, that any portion of said share of income which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit, or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise."

By the third item of the codicil the final distribution of the estate, if not sooner made under the powers conferred by the will is directed to be made "as soon as may be, after the death of my son, Cassius, provided, at that time the youngest child of my daughter, Arrial, then living, shall have reached the age of majority," and by the fifth item of said codicil, it is declared that "in the event my son Cassius should have no children living, or grandchildren living at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession one-half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half, as he may deem best, and at the death of Cassius, said one-half of my estate so retained and held to be by said executor distributed *per stirpes* among the children and grandchildren of my daughter Arrial.

On the final distribution of the principal or *corpus* of the
217 estate of the children of Cassius, then living, and the children of the daughter, Arrial, or their issue, were to share therein equally after equalizing advancements made to their respective parents by the testator. There has been no final distribution or division of the principal of the estate, and it is not material to the present case to determine when such division could or should be made by the executor, the son, Cassius, being still alive, and the youngest child of the testator's daughter not attaining his majority, until September 17, 1894.

While the will gives to the executor the amplest and most complete discretionary powers in the management and control of the estate, and invests him with full authority to rent, sell or improve the whole or any part thereof, real or personal, and to invest, and from time to time reinvest in such manner and in such property, either real or personal, (as) he may deem best to do, the same as the testator could do if living. Certain trusts are created and impressed upon the net annual income or incomes of the estate during the life of

Cassius, or until the final distribution is made of the principal, which confer rights and impose duties not covered by or subject to the general powers conferred upon the executor in respect to the "corpus" of the estate. The testator clearly intended to separate the net income from the body of the estate, and to impress such income with a trust for the benefit of designated "*cestui que trust.*," and imposed upon the executor as trustee, the duty of executing and carrying such trust into effect. Now, who are the beneficiaries of this income trust, and how far are the rights of such beneficiaries subject to the discretion of the trustee in *in* respect to the application or disposition of the trust fund? It cannot be questioned that the three children of the testator's daughter, Arrial, take a vested equitable estate or interest in and to one-half of said net annual income, which, under the directions of the will, the
218 trustee was required to distribute, expend or invest for their benefit equally. He was given the discretion to pay the whole or any part of each child's share of such income in cash, or if in his judgment, such share of the income could not all be properly and judiciously expended for, or advanced to said beneficiaries, he was authorized and directed "to invest such surplus as may remain, after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who will be entitled to it (the surplus income) under the foregoing plan of distribution." In case any of said children should die without issue before the final division of the estate, the share of the income of such child or children so dying, was to be divided between the other (surviving) children of Arrial, or in the event any of such children should die before final distribution of the estate, die leaving issue, the share of such child so dying, was to be paid to such issue. These limitations over in the event of death of any of said children before the principal of the estate is divided, clearly relate to their respective shares of the one-half of the annual net income given to him as a class, and in no way effect the question under consideration, touching the existence and character of the trust intended to be impressed upon the income of the estate, and the duties and powers of the trustee in respect to such trusts. That it was the duty of the trustee, during the life of these grandchildren, until the final division of the principal of the estate, to pay over to, expend or invest for them their respective shares of said one-half of the net annual income, is further shown by the ninth item of the will, which directs that the executor "shall continue to control and manage my estate and distribute, or distribute and invest the annual income of my estate as hereinbefore provided from year to year," until the final distribution of the estate is made. In making distribu-
tion, expenditures or investments of said income for the
219 benefit of the "*cestui que trust.*," the testator desired the trustee to have in view, the maintenance and education of his grandchildren on a scale comporting with their condition and rank in life. This expressed desire was manifestly not intended to cut down or restrict the trust, in favor of said grandchildren, to one for maintenance and education, but was merely

suggested as a consideration, to be borne in mind by the trustee, in making advancement or expenditures for the beneficiaries out of the trust fund, for it is followed by the imperative direction to invest such surplus of the income as remain after all reasonable expenditures have been made, for the benefit of the child or grandchild who would be entitled thereto under the testator's plan for the distribution of the income of his estate. There is no declaration, expressed or implied, that the one-half of the net annual income impressed with the trust, or any part thereof, is in any event to go back to the "corpus" or body of the estate and form a portion of the principal, to be finally divided between the children of Cassius and Arrial, after equalizing advancements previously made by the testator. It hardly admits of discussion, that the children of Arrial could compel the trustee to execute this trust in their favor and apply one-half of the net annual income of the estate to their benefit. They could require him either to distribute, expend or invest, to or for them, said income, according to their respective shares therein, subject to the contingent limitations, over, in the event of either dying, before the final distribution of the estate. The neglect or refusal of the trustee, either to distribute or invest the trust fund for their benefit, would be a clear breach of trust. The trustee was undoubtedly invested with a discretion as to the amount in "quantum" of the income he would pay over in cash, or expend for the beneficiaries, and this discretion, so long as honestly and reasonably exercised, a court of equity could not or would not control; but the surplus or residue of income not so distributed, was required to be invested for the benefit of the "*cestui qui trust.*" entitled thereto. There is nothing to indicate that it was the intention of the testator to limit and confine the application of the trust fund to the personal support of the designated beneficiaries; on the contrary, it clearly appears that the provision was for their general benefit. There is no direction or provision against anticipation or alienation by the "*cestui qui trust.*" of the benefit or *in* interest given, nor is there any intention, expressed or implied, that the interest of the beneficiaries in the trust fund shall not be liable for or be subjected to the payment of their debts. Neither is there any limitation over, in the event of bankruptcy, or upon the attempt of creditors to reach the share or interest of the "*cestui qui trust.*," in the funds. Under these circumstances, it is clear that the children of Arrial, when or as they come of age, could, in the absence of some prohibitory statute, have assigned or alienated their respective shares in the trust fund already accrued, or which might thereafter accrue, up to the final division of the principal of the estate. It is equally clear, that their respective shares in the trust fund, in absence of positive provision of law exempting such equitable interest from liability therefor, could be subjected in equity to the payment of their debts contracted after they may have attained their majority. Now, what has been said as to the one-half of the net annual income bequeathed in trust for the children of the daughter, Arrial, applies with equal, if not greater, force to the other half of said income given for the benefit of Cassius, or for Cassius and

his family or children. "The '*cestui- qui trust.*' of each half of the net yearly income are placed upon substantially the same footing, with this exception, that there is no limitation over this, Cassius' half of the income in the event of his death, or of the death of either of his children be-
221 fore the final devision of the estate. The trustee is directed by the eighth item of the will to expend one-half of said net income for the benefit of Cassius and his samily, or in case he should deem it best, to pay the whole or any part thereof over to Cassius, in cash, and, if, in his judgment, said half of the net income could not all be properly and judiciously expended or advanced to Cassius and his family, the trustee is directed to invest the surplus thereof "for the benefit of the child or grandchild who would be entitled to it (such surplus income) under the foregoing plan of distribution." The "foregoing plan of distribution," thus referred to, related alone to the net yearly income impressed with the trusts in favor of the designated beneficiaries. By the second item of the codicil, which was intended to settle definitely, and free from dispute, that portion of item 8 of the will, relating to the division and distribution of the annual net income of the estate, the testator declares it to be his wish and will, and he accordingly directs "that the one-half of said net yearly income which is to be expended for the benefit of my son, Cassius, and his family, is to be expended for his benefit only until the time arrives for the final distribution of my estate shall be made, and the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, 'so long as he, Cassius, shall live,' to be modified and controlled; also, that the one-half of said annual income which is to be expended for the benefit of Cassius, as aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied, as my said executor shall deem best, and not otherwise for the benefit of my son, Cassius, and his family; also, that any portion of said share of income which may be invested for the benefit of Cassius, shall, likewise, be held and kept in his own possession, in trust, by my
222 said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise." It appears that no portion of said share of income has been invested by the trustee for the benefit of Cassius, but that there is a portion thereof remaining unexpended and undisposed of, which the trustee holds for the objects of the trust. The person or persons entitled to this unexpended and uninvested surplus of the accrued income, or to such income as may hereafter accrue until the final division of the estate presents a question of some difficulty. The complainant insisted that Cassius is the sole beneficiary. The respondents contend that the "family" of Cassius share equally with him in the trust fund. If Hattie L. Hanna, the wife of Cassius, is entitled to a beneficial interest in said income trust, her share, thereof, would be equally liable with that of Cassius, she being equally bound by

the judgment sought to be enforced. I am, however, of the opinion, after careful consideration of the matter, that the wife of Cassius takes no beneficial interest or share in the trust, and that Cassius himself is not the sole beneficiary thereof, but that the objects of the trusts to the one-half of the net income involved, are Cassius and his children, of whom there are two, one a minor, and one now adult. The word "family" employed in the will, admits of a great variety of applications. It may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and the children, or his children, excluding his wife; it is sometimes construed to mean heirs-at-law. Its proper interpretation in each case must depend upon, and be determined by the context of the will, the circumstances in which the testator is placed, and the character and situation of those who may be presumed to be the object of his bounty. Story's Equity Jurisprudence, section-
1065 B, and 1071, and cases cited.

223 In Pigg *vs.* Clarke, L. R. Ch. Div. 672, it was said by the master of rolls, that "every word which has more than one meaning, has a primary meaning; and if it has a primary meaning, you want a context to find another. What then is the primary meaning of 'family?' It is children; that is clear upon the authorities which have been cited, and independently of them I should have come to the same conclusion."

In the present case it may be assumed that Cassius and his children were equally with the children of the deceased daughter, Arrial, the objects of the testator's "bounty." The provisions of the ninth item of the will, and fifth item of the codicil, indicate that the children of Cassius were the beneficiaries intended by the term "family," rather than the wife and children. They came within the expressed desire of the testator that the trustee, in the expenditure of the trust fund, should have in view the maintenance and education of the grandchildren on a scale comporting with their condition and rank in life. Cassius' children are so far implied, if not express objects of the testator's bounty, that if the entire trust fund were paid over to, or received by him, a court of equity would treat and consider him a subtrustee for their benefit to the extent of a fair proportion of the fund under the principal laid down in Chase *vs.* Chase, 2 Allen (Mass.), 101. Perry on Trust, sec-. 117 and 118, and cases cited. The children of Cassius being cobeneficiaries with him of the trust fund, it is claimed that there can be no apportionment thereof, so — to give him or his creditors any definite or separate portion thereof. It is however well settled that a court of equity can, and will in cases like the present, apportion the trust fund. Perry on Trusts, sec. 118; Nichols, assignee, *vs.* Eaton, 91 U. S., page 723, and cases cited.

How the trust fund, in question, should be divided between Cassius and his children, is a matter not free from doubt or diffi-
224 culty. Taking an equitable view of it, the apportionment should be made between them, so as to assign or allot one-half thereof to Cassius, and one-half to his children, thus making

Cassius' share from the net yearly income of the estate one-fourth of the whole.

It is further urged that the trust fund here under consideration to give for the support of the designated beneficiaries, and that Cassius' interest therein, cannot be subjected to the payment of his debts. There is nothing on the face of the bill to sustain the assumption, that the income impressed with the trust was intended for support rather than for the general benefit of "*cestui qui trust.*" But suppose it was bequeathed for that purpose, or for that object, would that defeat the right of the beneficiary to alienate his interest or prevent his creditors from reaching it in the absence of some positive provision of law, exempting it from such liability, or of a clearly expressed intention on the part of the creator of the trust, that the fund should not be assigned or be made liable for the debts of the "*cestui qui trust.*?" We think not. The general doctrine on the subject is thus stated by Perry on Trusts, section 386, "Therefore, when an equitable interest is mentioned in the '*cestui qui trust.*', he may depose of it or it may pass to his assignee by operation of law if he became a bankrupt. Thus a trust for a person's support, or to pay the interest to a person for life, as the trustee may think proper, or when it shall become payable, or in such sums or portions, and at such times and in such manner as the trustee thinks best, may be exercised according to the direction of the trustees; but the brankruptcy of the '*cestui qui trust.*' puts an end to the discretion of the trustees, and vests the whole interest in the assignees; and this is so where the trustees were directed to pay, as they should think proper, and at their will and pleasure and not otherwise, so that the '*cestue qui trust.*' should have no right, claim or demand other than the trustee should think proper." The court thought in Snowden
225 *vs.* Dolor (6 Simons, 524) that taking the whole instrument together, the "*cestui qui trust.*" has a vested interest; that those directions applied only to the manner of enjoyment, and that the equitable interest vested in the assignee at his bankruptcy. The test is, "would executor of the "*cestui qui trust.*" have a right to call for any arrears; if so, the assignees would have the right to call for the future income or interest." This is directly applicable to the present case. There is a further consideration and distinction on this subject pointed out by the court in Slattery *vs.* Wasson, 151 Mass., 266, where, it is said, "when the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be inalienable; but when the right is given for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor, that it shall not be alienated is presumed." What is meant by this latter clause, is, that when a fund is given not to a trustee, but to any person beneficially, and is charged with the support of another, the latter's interest is presumably inalienable. Thus in Baker *vs.* Brown, 140 Mass., 369, the

testatrix gave her estate to daughters, "subject to the condition that they should support their father during his lifetime." It was held that under the circumstances of that case the intention of the testatrix was, that the daughter should furnish the father with a reasonable support in their own household or elsewhere, the mode of his support being in their discretion, and that the interest of the father was such that it could not be reached by his creditors without imposing upon the daughters duties and obligations different from, and greater than those imposed by the will.

The general doctrine laid down in Perry on Trusts, sec-
226 tion 286 and 286a and in 2 Story's Equity Jurisprudence, section 974 and 974a, following the English rule announced in Brandon *vs.* Robinson, 18 Vic., 429, that alienability and the consequent liability for debts is an inseparable incident, attaching to any vested beneficial interest or trust estate in the absence of limitations over or for other provision for the lessor of such interest in such event, has no doubt been qualified or departed from by many courts in this country to the extent of holding, that a party may settle property on another, or for another's benefit, in such a manner that it cannot be alienated or passed to the assignees to be reached by creditors, even when there is no provision that the interest shall cease and determine upon the happening of such contingency nor any limitation over. Thus it is said in Sparhawk *vs.* Clom, 125 Mass., 263, that "the rule in England since the time of Lord Eldon has provided, that when income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by and liable in equity to the debts of the '*cestui qui trust.*' and that this quality is so inseparable from the estate that no provision, however expressed, which does not operate as to lessor or limitation of the estate or interest itself can protect it from his debts, (citing Brandon *vs* Robinson, 15 Vesy, 429; Bramhall *vs.* Ferris, 14 N. Y., 41–44, and Nichols *vs.* Levy, 5 Wallace, 433). On the other hand, it has been maintained by the courts of recognized authority that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or to subject it to be taken by this condition; and that his intention in this regard when clearly expressed by him, must be carried out by the court, even though there is no lessor or limitations over." The Broadway National Bank *vs.* Adams, 123 Mass., 170, it was held that a person having the entire right to dispose of property may settle it in trust
227 in favor of another with the provision that the income shall not be alienated by the beneficiary by anticipation or be subject to be taken by his creditors in advance of its payment to him, although there is no sessor or limitation over the fund or estate in such an event. In Foster *vs.* Foster, 123 Mass., p. 179–180, the will provided that "the trustees may, in their discretion, pay or apply the income to the personal benefit or comfort of the son or such member or members of his immediate family as the trustees may think proper, and that such income shall not be subject to his (the son's) debts, or assignable by him by way of anticipation," and

it was held that the son had no such interest as could be reached by his creditors. That case is too clearly distinguishable from the present to require further notice. It certainly does not sustain the contention, that the share of Cassius, of the trust fund under consideration, cannot be reached by complainant. Maynard *vs.* Cleales, 149 Mass., 307, more nearly approaches the present. There, the testator gave to his wife, during her life, the income of all his estate "to be for her comfort and support," and expressing the wish that she provide for an unmarried daughter, and that "a home and grounds" be kept "as a home for them." After the death of the daughter, creditors of the beneficiary were allowed to subject the income to the payment of their debts against her, the court saying, "It is settled in this Commonwealth, that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him or be subject to be taken by his creditors. But in order to give such a qualified estate, instead of an absolute one, the language of the testator must be such as clearly to impart an intention to do so. In the case at bar, the testator makes an absolute gift of the whole income of his estate to his widow for her life. The words, 'to be for her comfort and support,' at most, express the motive and purpose of the gift, but cannot be held
228 to make the gift conditional. They have little, if any, more significance than the words, 'to be for her benefit and enjoyment,' and are not to cut down the clearly expressed, absolute gift to a qualified or conditional one."

The courts of Vermont, Connecticut, Pennsylvania, Maryland, Virginia and Missouri hold substantially the same doctrine as that announced in the above Massachusetts decision, and the Supreme Court, in Nichols, assignee, *vs.* Eaton, 91 U. S., 716 to 730, has indicated an inclination to adopt this modern view and departure from the English rule; but neither in that case, nor in any other that has come to our attention, has the Supreme Court actually done so. The positive authority of Nichols, assignee, *vs.* Eaton, is coextensive only with the facts on which it was made. It has, however, been frequently misapplied, or pressed beyond what was actually decided. In that case, the will contained the expressed provision, that if the beneficiary should alienate or dispose of the income to which he was entitled under the trusts of the will, or if, by reason of bankruptcy, or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by him, but the same would become vested in or payable to some other person, than the trust expressed in the will, concerning so much thereof as would so vest, should immediately cease and determine, and the trust fund was then to be paid to the wife and children, or the wife and child, as the case might be, of the beneficiary, and in default of any wife, child, or children, the income was to accumulate in augmentation of the principal fund, thus making a clear limitation over upon the happening of the designated contingencies which were to determine the beneficiary's interest.

It was further provided, that in case, after the cessation or determination of the beneficiary's interest in the income, as directed by

the trustee, might, "in their discretion," but without its being
229 obligatory upon them, pay to, or apply for, the use of "the beneficiary or for the use of him and his wife and family," so much and such parts of the income to which the said beneficiary would have been entitled under the preceding trusts, in the case of forfeiture provided for had not happened.

The trusts, under the will, terminated by the bankruptcy of the beneficiary. The assignee thereafter claimed the fund, or a portion of it, under the discretionary power conferred upon the trustees, to pay to, or apply, the income for the use of the "*cestui qui trust.*," or for him and his wife and family, to the same extent the beneficiary would have been entitled if the forfeiture had not happened. It was conceded by the claimant, and so held by the court, that the beneficiary's interest given by the will had ceased and determined on his bankruptcy, and it was further held by the court that it was, *the* thereafter, purely discretionary with the trustee-, whether they would pay to, or apply, any parts of the forfeited income to the use of the beneficiary, or for him and his family, and that this discretionary power in the trustees could not be controlled by the court, or be called into exercise, either for the former "*cestui qui trust.*," or his creditors. Whatever might come to the beneficiary from the voluntary exercise by the trustees of the discretion conferred upon them, would neither constitute a portion of the trust bequest nor be subject to the control or claims of the assignee. This case of Nichols *vs.* Eaton closely resembles that of Goodin *vs.* Crowhurst, 10 Simons, 642–644, where the will directed, that in case the testator's son, for whom the trust was created, "should at any time, or times, make any assignment, mortgage, charge of, or upon, or in any manner dispose of by way of anticipation, the said interest, dividends or accumulations, or any part thereof, to which he was entitled for life, as aforesaid, or attempt or agree so to do, or commit any act whereby the same, or any part thereof, could or
230 might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person, or persons, then, and in any of said cases, his trustee henceforth pay and apply the said interest, dividends and accumulations for the maintenance and support of his said son and any wife and child or children he might have, and for the education of such issue, or any of them, as the trustees, for the time being, should, in their discretion, think fit." There, as in Nichols *vs.* Eaton, the beneficial interest given by the will terminates upon the happening of one of the contingencies expressly provided for, and thereafter the application of the fund rested in the discretion of the trustees. Neither of these decisions, cited and relied on by respondents, are in point here. The case under consideration is essentially different. Here there is no intention, expressed or implied, that the share of the trust fund given to Cassius was to terminate or be forfeited in any event or for any cause. Nor was there any prohibition against alienation or anticipation, but his interest was continued, without restriction as to its use, during his life, or until the final division of the "corpus" of the estate. Neither was it left to the discretion of the trustee to

give or withhold this interest from designated beneficiary; on the contrary, it was made his imperative duty to pay over or expend or invest that share of the fund for the benefit of the "*cestui qui trust.*" Such discretion as was conferred upon the trustee related alone to the "quantum" of the fund he would pay, was in cash, or in the manner of its expenditures for the beneficiary, or to the investment of any surplus of the fund for the benefit of Cassius. The trust was an executed one, and such discretion as was given the trustee, was subject to control and neither prevented the interest intended for Cassius, from investing, nor in any way effected his beneficial ownership of a share in the trust fund with the ordinary incidents of such equitable ownership. If, therefore, the more modern rule adopted in
231 some of the States in reference to trust interests, or estates, were applicable to the case at bar, it would not follow that the share of Cassius in the trust fund here involved, could not be reached by his judgment creditor. Some of the authorities relied on by respondents, such as Leavitt *vs.* Bovine, 21 Conn., page 1, were settlements for married women and for wives and children, which stand upon a different footing. The rule in respect to trusts for married women being, that during coverture restrictions or provisions against alienation or anticipation, are valid, but terminate or cease to be operative upon, or after discoverture. Perry on Trusts, section- 387 and 671. This class of cases *have* no application to trusts in favor of persons "*sui juris*" like the present.

In some of the States, as in New York, Illinois and Tennessee, there are statutory provisions preventing the alienation of trust estates, or exempting the interest of the beneficiaries therein from liability for the debts where the trust is created by, or the property so held has proceeded from some person other than the defendant himself, and the trust is declared by will, duly recorded, or deed duly registered. Graff *vs.* Bennett, 31 N. Y., 9; Campbell *vs.* Foster, 35 N. Y., 361; Williams *vs.* Thorn, 70 N. Y., 270; Nichols *vs.* Levy, 5 Wallace, 433; Spindle *vs.* Shreve, 111 U. S., 542 to 548, and one branch of Potter *vs.* Crouch, 141 U. S., 319–320, were cases where such statutory provisions were construed and applied. In Spindle *vs.* Shreve, at pages 547 and 548, it is said by Mr. Justice Matthews, speaking for the court, "that it cannot be doubted that it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of rents, issues, and profits, and produce the same by appropriate limitation and power to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the
232 beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part, or '*in invitum*' by his creditors. The limits within which such provisions may be made and administered, of course, must be found in the law of that jurisdiction, which is the 'situs' of the property in case of real estate, and in case of personality, where the trust was created, or is to be administered according to circumstances; and in determining those limits that law declares how far, and by what forms and modes the

institution of property may be permitted to accommodate itself to the will and convenience of individuals, without prejudice to public interest and policy; by what limitations and instruments its usual incidents may be affected and altered, so as to effectuate the intentions of parties. How far does the dominion, implied in the idea of property, may be extended, so as to limit the future dominion of those who succeed to the beneficial enjoyment. It follows, therefore, that the judgment in each case must be determined by the positive provision of the law of the localities which govern it, and the particular terms of the instrument by which the scheme is framed." The result of the authorities most favorable to contention of respondents, is, that where the creator of the trust does not expressly, or by clearly manifested intention, restrict alienation, or exclude the trust property, or fund from liability for debts of the beneficiary, and there is no positive provision of law to the contrary, the "*cestui qui trust.*" may assign his equitable interest, or estate, and the same may be reached and subjected to the payment of his debts by a court of equity, after his creditor has exhausted his remedy at law. "It is the settled rule of law," says Mr. Justice Swayne, speaking for the court, in Nichols *vs.* Levy, 5 Wallace, 441, "that the beneficial interest of the '*cestui qui trust.*,' whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent char-
233 acteristic of right and enjoyment to the beneficiary and immunity from his creditors."

There is no statute of Ohio establishing a rate of property in respect to trust estates that exempts the interests of the beneficiary therein from liability from his debts; on the contrary, it is provided by section 5464, Revised Statutes of Ohio, that "when a judgment debtor has not personal or real property subject to levy or execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgages or otherwise, or any interest he may have in any banking, turnpike, bridge or other joint stock company, or in any money contract, claim or chose in action due, or to become due to him, or in any judgment or order, or any money, goods or effects, which he has in the possession of any person or body politic or corporate, shall be subject to the payment of the judgment by action." It hardly admits of debate, that the interest or share of Cassius, in the trust fund held by and in the possession of the defendant, Brooks, falls within the comprehensive provisions of this statute; and we have been cited to no decision, or decisions of the supreme court of Ohio, holding that such an interest as that given to and possessed by Cassius B. Hanna, in the trust fund under consideration, could not be reached by his creditors. Under the general rule stated by Mr. Justice Matthews, in Spindle *vs.* Shreve 111, U. S. 547 to 548, quoted above, testators in Ohio cannot so execute wills or create trusts that a compliance therewith will result in a violation of law, or in overriding the provisions of the statute, making the interest of the beneficiary in a trust liable for his debts, unless there is some forfeiture clause or limitation over, which will operate to terminate the interest of the estate of

the "*cestui qui trust.*" It may well be doubted whether under a statute like that of Ohio, an expressed intention or declaration of the testator, that the share of Cassius in the trust fund
234 should not be subjected to his debts, in the absence of any limitation over or termination of his interest, could have been sustained. It is not a sound proposition to say that the intention of the testator in such a case, must be executed without regard to the existing law, or that his expressed wishes shall prevail against the positive provisions of the statute in respect to interests or estates given. In Kentucky there is a statute substantially like that of Ohio, and the decisions in that State fully sustain the views above expressed. Thus in Marshall *vs.* Nash 87, Ky. Rev. 116, the interest of the "*cestui qui trust.*," was given to him absolutely, but in discretion in the trustees in whom the control or title was vested, to pay to him such portions of the profits and in such manner as he might think best. It was held, this discretion the trustee was bound to exercise in good faith, and a reasonable exercise of which a court of equity would compel for the benefit of the beneficiaries, and that the interest of the "*cestui qui trust.*" could be reached and subjected to the payment of his debts, and it was so subjected, notwithstanding the discretion conferred upon the trustees. In Haycraft *vs.* Bland (Kentucky) 9th Lawyers' Report, annotated 599, there was a trust fund created, the income of which the will directed to be paid annually to a certain person for life, and declared that such income should not be subject to the debts of the beneficiary, and that if any attempt was made to subject it to such debts, it should be added to the principal, and the beneficiary should receive no part of it; these provisions of the will were held not to take such income out of the operation of a statute making trust estates subject to the debts of those for whose use they are held. In the more recent case of Bull *vs.* Ky. National Bank (Ky.) 12, Lawyers' Reports, annotated pages 37 to 41, the same general principal announced and applied where the devisor of the rents, and profits of an estate, provided that the interest should not be subject to the claims of any creditors.

235 Without multiplying authorities on this subject, which is fully discussed in those already referred to, and in 2 Pom. Eq. Jur. section 536, the conclusion of the court is that Cassius B. Hanna's share of the net annual income of the estate accrued, and to hereafter accrue, until the final distribution of the principal thereof, as provided by the will, can be reached and subjected in this proceeding to the payment of complainant's judgment. The question on which the court entertains the most doubt, is, whether said Cassius is not entitled to the entire one-half of said net income, instead of the share of as above indicated and apportioned to him, but this doubt the court has resolved against the complainant and in favor of Cassius' children on the presumption that the latter were together equally with the son, objects of the testator's bounty.

In regard to what should be treated or regarded as the net yearly income of the estate, which is made the subject of the trust by the will, the chief, if not the only question or matter of difference or dis-

pute between the parties, is whether certain funds or monthly payments received and to be received by the executor and trustee from the Hocking Coal and Iron Company, under a written contract made and entered into between him and said company on September 9, 1885, for the mining of coal on certain land of the testator located in Hocking county, Ohio, are to be considered "income" or part of the corpus of the estate. The master has reported that the money received under this contract (amounting up to March 31, 1892, to the sum of $30,000) was "income" of the estate within the terms of the trust. To this the respondents have excepted, claiming that the fund is part of the "corpus" of the estate. The executor and trustee has so treated it and made no distribution or investment thereof for the beneficiaries entitled to the net income under
236 the trust. Whether said fund is to be regarded as "income" or "corpus" of the estate depends mainly upon the question whether the contract under which it has been and is still being received is a lease of the coal mine or a sale of the coal as part of the realty. This must be determined by the proper construction of the instrument and the intention of the parties. By the terms of the contract called an "agreement," the executor "grants" to the Hocking Coal and Iron Co. "the exclusive right, license and permission to enter upon the mine and remove the coal" from the premises. He also "grants" to said company "the right to occupy and make use of so much of the surface of said land as will enable the second party (said company) to efficiently and properly conduct said mining operations; also, the right to make use of so much of the timber on the surface of said premises as may be necessary in mining on said premises." In consideration whereof, the company agrees "to mine the coal of said premises, and to take therefrom, or to pay royalty on not less than 50,000 tons of coal in each and every twelve months' period, from and after the first day of September, 1885, and so continue to mine and pay royalty until all the coal that can be practicably mined on said premises shall be so mined and paid for; provided, that if the second party shall not find it practicable to remove more than 25,000 tons of coal during the first period of twelve months under this lease, the remaining 25,000 tons due for said period shall be mined or paid for in addition to the stipulated 50,000 tons in the year following." The company "further agree to conduct such mining operation in a good and workmanlike manner, and especially in such manner that all the coal that can be practically mined on said premises shall be so mined and paid for." The company also agrees, within three months, to furnish the executor a map and specifications of the plan on which it proposes to conduct the mining operations, also the size and location of pillars which it proposes to leave in order to keep
237 said mine in a perfectly good condition until the coal as aforesaid shall be removed from the premises. Such plans and specifications were to be deemed part of the contract and receive the approval of the executor before the contract was to have any force whatever. The second party further agreed to pay the executor "as royalty for the coal land to be mined and (coal) taken

from the premises as aforesaid in each month, the sum of ten (10) cents per ton of two thousand pounds for lump coal, such as usually passes over an inch and a quarter screen. Said payment to be made on or before the twentieth day of the month following the month in which such coal shall have been mined. It is the intention of the parties, that said monthly payment under this contract, at least to the amount of $416.67, each shall be made regularly, whether the monthly proportion of coal, on the basis of 50,000 tons per annum, shall have been mined or not, and that any payment so made in advance of coal actually mined shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for; also, that said second party shall be deemed to have fulfilled its covenant in respect to payment of royalty during the first two years of this lease, if it shall pay monthly, on the basis of 25,000 tons per year for the first of said twelve months' period, and on the basis of 75,000 tons per year for the second of said twelve months' period."

At the time of making the monthly payments, the company agreed to furnish a written report by its engineer or other proper officer, showing the number of tons of coal mined during the preceding month, also the total number of tons mined to date of said report, also a description of the location in the mine from which the coal mined in the month preceding was taken, to the end that the executor might be fully advised as to "the amount of coal
which may have been taken from said premises under this
238 lease, the amount paid thereon, and the place from which the
same shall have been taken." The right was reserved to the executor, either in person or by his representative, to enter upon the premises or any part thereof at reasonable hours, for the purpose of inspecting the work of mining the coal, etc., and verifying, by measurement or otherwise, the amount of coal that has been taken from the land. The right is also given the executor to inspect the books and papers of the company, relating to its operations "under this lease," for the purpose of verifying the accuracy of said reports. The company was to pay taxes, fees and expenses under State or national laws on the coal mines, while the executor was to pay taxes on the land and coal which was not mined. It was further provided, that if the coal should "fail (or company) neglect or refuse, for thirty days after the same became due, to make any monthly payments this lease may, at the option of the first party, and not otherwise, be declared forfeited, and, in the event of such forfeiture, the first party may at once re-enter and take and hold exclusive possession of the demised premises, and any and every part thereof." The executor was also given the right to forfeit the contract for the company's failure or neglect to perform either or any of its covenants, and was given a lien in case of any such default upon all the improvements, tracks and fixtures which the company may have constructed or placed upon or under the surface of the premises granted, as security for full performance for the each and every covenant stipulated to be paid or performed. If the mining operations of the coal were interrupted by strikes, or

through means or agencies beyond its control, the obligation to mine and pay said royalty should be suspended during the period of such interruption, but, except during the period of such unavoidable interruption, the company was to be liable for "the amount of royalty which would be due under the terms of this contract, in respect to coal mined each month, the same as if
239 said coal had actually been mined." It was further agreed, "that the company should make no sale, transfer or assignment in any form of its rights under this agreement, nor sublet any portion of said premises hereby demised" without the written consent of the executors, "and any such sale, transfer, assignment or subletting, without the consent of the first party in writing, shall be null and *a*void." When the company has mined and paid for all the coal that can practically be mined and fully performed all its covenants, it was permitted to remove from the said premises all tracks, fixtures and other properties which it may have placed thereon.

This contract or agreement is clearly, in its legal effect and meaning, a lease, and the monthly payment of $416.67, whether coal is mined or not, although called "royalty" is the rental to be paid by the lessee for "the exclusive right, permission and license to enter upon said mine and remove the coal" together with "the right to occupy and make use of so much of the surface of said land as will enable the second party to efficiently and properly conduct said mining operations, and to make use of so much of the timber on the surface of the premises as may be necessary in mining." That the executor "grant" these rights, in no way changes the character of the agreement, which is five times referred to as a "lease." No technical words are necessary in a lease, and it is not material that the rental to be paid to the lessee is called "royalty," which is perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mines. The subject of the contract is frequently referred to in the instrument, as the "demised premises." The stipulations against subletting, without the written consent of the executor, and for forfeiture and a re-entry for the non-payment of the monthly royalty or rent, or for non-performance of either or all of the cove-
240 nants on the part of the company, are more appropriate to a lease than to an absolute sale of the coal in place, or as mined. "The legal understanding of a lease for years, is a contract for the possession and profits of land for a determinate period, with the recompense of rent." U. S. *vs.* Gratiot, 14 Peters, 538. In that case, the license for smelting ore was styled an "indenture" and the compensation to be paid, was six pounds for every one hundred pounds of lead smelted. It was held to be a lease. In the present case, the term is sufficiently definite. Subject to its sooner termination under the forfeiture clauses of the contract, it is to continue so long as there is coal that can be "practicably mined." This constitutes a "determinate period." The parties themselves contemplated a lease and so regarded the contract. The resolution of the Hocking Coal and Iron Company's board of directors, authorized

and directed its president to execute in the name and under the seal of the company "an agreement of lease" between itself and the defendant, Brooks, executor and trustee of the coal in the described premises, and said Brooks, in his testimony attached to the amended and supplemental report (page 15), speaks of the contract as a lease, the contract in Hyatt *vs.* Vincennes Nat. Bank, 113 U. S., 408, was treated as a lease, although it purported to "convey" all the minerals, coal, iron ore, etc., upon and under the land, for which fixed royalties were to be paid for the articles mined and removed. The case of Edwards *vs.* McClurgh, 39 Ohio State, 41, 48, cited and relied on by defendant, is clearly distinguishable from the present, and does not support their contention, that the contract here involved is a sale of coal, rather than a lease of the mining rights, but aside from all this, the money received under the contract, whether called royalty or rent, is clearly "income or increase of the estate," collected by the executors. The company has not yet mined a ton of coal under this contract, but it has been making the stipulated monthly payment of the $416.67
241 since September 1, 1885; whether the company will ever exercise its rights or license to mine coal, rests upon its own volition, should it fail, or decline to mine coal, or for any excuse forfeit the right to do so, the money received by the executor could not possibly be considered a part of the realty or "corpus" of the estate rather than "income." Again, the contract provides that the company "shall be deemed to have fulfilled its covenant in respect to the payment of royalty during the first two years of this lease if it shall pay monthly on the basis of 25,000 tons per years for the first of said twelve months' period, and on the basis of 75,000 tons per year for the second of said twelve months' period." But subject to that exception of special provision for the first two years, the contract declares that "it is the intention of the parties that the said monthly payments, at least to the amount of $416.67, each shall be made regularly whether the monthly proportion of coal, on the basis of 50,000 tons per annum, shall have been mined or not, and that any payment so made in advance of coal actually mined, shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for." No coal having yet been mined, the company, in order to get any benefit of the payments already made, must in the future mine coal in excess of 50,000 (tons) per annum.

How can the right or license to mine coal in excess of the minimum of 50,000 tons per annum, taken in *the* connection with the uncertainty whether it will ever be exercised or not, operate or have *to* effect to convert or change funds that are now clearly income, into "corpus" of the estate? The intention of the testator was to give the designated beneficiaries of the trust the net "income or increase" of his estate that should be collected and received by the executor under powers of management and control, as broad as those possessed by himself, if living. In Ely's Appeal,
242 103 Penn. State, p. 103, when the word "income" was used in a will creating a trust, the court said, "In seeking for the

testator's intention, we derive little or no assistance from that class of cases in which it has been properly held that a lease of the exclusive right to mine and remove coal or other mineral, without limitation as to quantity or time, is practically a sale of the coal or mineral in place, and consequently a sale of the land itself. The word 'income' means the gain which accrues from property, labor or business. In its ordinary and popular meaning, it is strictly applicable to the periodical payments in the nature of rent, which is usually made under coal and other mineral leases, and we have no doubt it was so used by the testator. In the absence of any provision, express or implied, that the payments in the nature of rents, shall be accumulated for the ultimate benefit of those in remainder, it would be a strained and unnatural construction to hold that he intended to give appellants only the annual interest in the installments of rent."

The further contention urged by respondents, that inasmuch as (the) coal mines in question were not opened in the life of the testator, the executor had no authority to lease the same so as to make the rental therefor income, is not sound. In Ely's Appeal, "*supra*," it is held that, "by empowering his executors with the written consent of six-tenths of the owners to lease the coal for mining purposes, the testator virtually gave appellants the same rights they would have had if the mines had been opened and operated in his lifetime." Daily *vs.* Becket, 24th Beavan, 114–123, supports this proposition, and is an authority directly in the point.

In the present case the executor was invested with the same power of leasing as the testator himself possessed, and that, too, without the consent of any one interested, directly or re-
243 motely, in the estate under the will. This manifestly placed the executor's authority, to make the contract in question, upon the same footing as though the mines had been opened by the testator in his lifetime. It is settled law, that the rents of an open mine are income, and go to the tenant for life; in Wentz's Appeal, 106 Pa., 301, and McClintock *vs.* Dana, 106 Pa., 386, it was decided, that when land is chiefly valuable for coal-mining purposes, although the mines are unopened, the power to lease the real estate included the power to lease the coal lying under the surface. So in Williard *vs.* Willard, 56 Pa., 119, it is held, that a life tenant of land, whereof the timber is the chief or intended source of profit, may cut it for profit. In the present case, it appears that the chief, if not the sole, value of the land was for coal-mining purposes, and that the only profit to be derived therefrom was by sale or lease of the coal, either of which the executor, in his discretion, had the power to do. Having exercised the discretionary power of leasing, the rents or royalties in his hands derived from the lease of the coal mines are to be regarded as income within the meaning of the testator's will. See Bedford's Appeal (Pa.) 17, Atlantic, 538.

It follows, that the exception taken by defendant or defendants to the report of the master as to the character of funds received by the executor, under said contract of September 9, 1885, with the Hocking Coal and Iron Company, must be disallowed and over-

ruled, and that the money already and yet to be received thereunder should be regarded as income, in which the defendant, Cassius B. Hanna, has one-fourth share, which is subject to the payment of complainant's debts. The $30,000 of rent or royalty received by the executor, up to March 31, 1892, has been commingled with other funds, and invested by him, and he states that there has been no loss on said investments. The master reports (amended and supplemental report), that exclusive of said royalties for lease
244 of coal mines, the trustee has received, between November 20, 1889, and March 31, 1892, net income to the amount of $17,008.67. It is suggested by counsel for defendant, that the master's addition is wrong, and that this should be only $16,518.67, but the court finds no such error in the addition, as claimed. The complainant is entitled to subject, in the hands of the trustees, one-fourth of said sum of $17,008.67 to the payment of his judgment against Cassius B. Hanna. The trustee will be allowed no credit for sums paid or advanced to Cassius B. Hanna and his wife, Hattie L. Hanna, from and after the fourth day of December, 1889, when said trustee was served with process in the cause and had notice of complainant's claim, and all payments and advances made by the trustees after that date were made at his own risk and peril, including the $1,876.50 paid Mrs. Ford on December 28, 1889, for account of Cassius B.

It is shown by the report that the income account of Cassius B. Hanna, prior to November 20, 1889, had been overdrawn to the amount of $690.95. This sum will be deducted from the above allowance, made complainant, as against said Cassius and the said trustee.

It is not material to determine and fix what is the exact amount of the present net annual income of the estate, either including or excluding the rent or royalty upon coal mines. There will, however, be inserted a provision in the decree, that one-fourth of the net annual income of the estate, including the rent and royalty from the lease of coal land and from all other sources, that may have been received since March 31, 1892, and that shall thereafter be collected and received by the trustee, shall, as received and collected, be paid over to complainant, or his attorney of record, and on and towards the satisfaction of the complainant's judgment and interest thereon, until it is discharged, or until the final division of the estate among the testator's grandchildren, as provided by the will.

245 The foregoing conclusions render it unnecessary to consider and separately act upon the various exceptions to the master's report or reports, filed by the parties. Said exceptions, so far as not disposed of above, are overruled. The costs of the cause, including a reasonable allowance to the special master, will be divided between the complainant and the defendant Brooks, each being taxed with one-half thereof. Let a decree be entered accordingly.

HOWELL E. JACKSON,
Circuit Judge.

January 18, 1893.

Endorsed: No. 4743. United States circuit court, northern district of Ohio, eastern division. F. A. Raynolds *vs.* Cassius B. Hanna. Opinion of court. Filed January 21, 1893. Irvin Belford, clerk northern district of Ohio, United States circuit court.

Clerk's Certificate.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS *vs.* CASSIUS B. HANNA *et al.* } In Equity. No. 4743.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States, for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the original pleadings, records and proceedings in the above case, as fully hereinbefore entitled, so full and entire as the same remains of record and on file in my office and now under my custody as clerk of said court.

246 In testimony whereof, I have hereunto signed my name and affixed the seal of the said court at Cleveland, in said district, on this thirty-first day of March, A. D. 1893, and of the one hundred and seventeenth year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk,*
By JNO. VAN NOSTRAU, *Deputy.*

247 No. 110.

United States Circuit Court of Appeals for the Sixth Circuit.

J. TWING BROOKS, Executor and Trustee of Robert Hanna, Deceased, Appellant,
vs.
F. A. RAYNOLDS, Appellee.

On appeal from the circuit court of the United States for the northern district of Ohio, eastern division.

Supplemental Record Embodying Appeal of F. A. Raynolds, Complainant.

Estep, Dickey, Carr & Goff, Cleveland, Ohio; Lawrence Maxwell, Jr., Cincinnati, Ohio; J. Twing Brooks, Pittsburgh, Pa., for appellant; Francis Wing, Cleveland, Ohio; J. Wm. Ball, Cleveland, Ohio, for appellee.

248 United States Circuit Court of Appeals for the Sixth Circuit.

Supplemental Record.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Eastern Division, } *ss:*

Supplemental record of the proceedings of the circuit court of the United States, within and for the eastern division of the northern district of Ohio, in the cause and matter hereinafter stated, and finally disposed of at a stated term of said court, begun and held at the city of Cleveland, in said district, on the first Tuesday in February, being the seventh day of said month, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and seventeenth.

Present: Honorable Augustus J. Ricks, United States district judge.

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee. } In Equity. 4743.

Be it remembered, that on April 7, A. D. 1893, a petition for appeal and assignment of error were filed herein, by the complainant, F. A. Raynolds, which petition for appeal and assignment of error read, and are as follows, to wit:

249 *Petition for Appeal.*

United States Circuit Court, Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS, Complainant,
vs.
CASSIUS B. HANNA, HATTIE L. HANNA, and J. TWING BROOKS, Trustee. } In Equity. No. 4743.

J. Twing Brooks, one of the above-named defendants, having prayed an appeal herein, and the same having been allowed, and the above-named plaintiff, F. A. Raynolds, also conceiving himself aggrieved by the final decree and order entered in said above-named case, doth hereby appeal from said decree and order to the United States circuit court of appeals for the sixth circuit, and prays that this, his cross-appeal, may be allowed, and that a transcript of the record and proceedings, and papers upon which said decree and order was made, duly authenticated, may be sent to the United States circuit court of appeals, and this cross-appellant, filed herewith, a specification and assignment of the errors in said decree and order, asserted and intended to be urged by him.

F. A. RAYNOLDS,
By FRANCIS J. WING AND
J. WM. BALL, *His Attorneys.*

And now, to wit, on the seventh day of April, 1893, it is ordered that the appeal be allowed as prayed for, upon the filing of a sufficient bond, in the amount of $500.00.

AUGUSTUS J. RICKS,
District Judge.

Assignment of Errors.

This cross-appellant avers and claims that there was error in the said final decree and order entered in the said cause, from which appeal has been prayed, in this: 1. That the court found and
250 decreed that the interest of Cassius B. Hanna, in the net income arising from the estate of his father, held in trust by J. Twing Brooks, trustee, was only a one-fourth interest, whereas it should have been held and decreed that the interest of said Cassius B. Hanna in such net income was a one-half interest.

2. That said decree and order finds that the complainant is entitled to subject, in the hands of the trustee, one-fourth of the sum of seventeen thousand and eight dollars and sixty-seven cents ($17,008.67) to the payment of his judgment against Cassius B. Hanna and Hattie L. Hanna, whereas it should have been found by said decree and order that one-half of said amount should be so subjected.

3. That it was found by said decree and order that one-fourth the net annual income of the estate, including the rent and royalty from the lease of coal land, and all other sources that might have been received since March 31, 1892, and that should thereafter and hereafter be collected and received by the trustee, should, as received and collected, be paid over to complainant or his attorney of record, on and towards the satisfaction of the complainant's judgment, and interest thereon, whereas it should have been found by said decree and order that one-half of said net annual income, including the rent and royalty from the lease of coal land, and all other sources that might have been received since March 31, 1892, and that should thereafter and hereafter be collected and received by the trustee, should, as received and collected, be paid over to complainant or his attorney of record, on and toward the satisfaction of the complainant's judgment, and interest thereon.

F. A. RAYNOLDS,
By FRANCIS J. WING AND
J. WM. BALL, *His Attorneys.*

Which said petition for appeal and assignment of error had the following endorsement thereon:

No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Peti-
251 tion for appeal and assignment of error. Filed April 7, 1893. Irvin Belford, clerk United States circuit court. Francis J. Wing and J. Wm. Ball, attorneys.

Order Allowing Appeal.

Afterwards, at the April, A. D. 1893, term of this court, to wit, on April 7, 1893, an order was made and entered herein, which order reads, and is in the words and figures following, to wit:

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } No. 4743. In Equity.

The complainant, F. A. Raynolds, considering himself aggrieved by the decree herein entered on the eighteenth day of February, 1893, comes now and presents to the court his petition for an appeal to the United States circuit court of appeals, together with an assignment of errors asserted and intended to be urged in that behalf.

On consideration whereof the court do allow said appeal, and fix the amount of the bond for costs on such appeal at the sum of $500, and it is ordered that, upon the filing and approval of said bond, a supplemental transcript of the record and proceedings in this case since the authentication of the transcript on appeal by the defendant, J. Twing Brooks, trustee, in this cause, be sent to said circuit court of appeals, as provided by the rules in such case.

Bond.

Afterwards, to wit, on April 22, 1893, a bond was filed herein, which bond reads, and is as follows, to wit:

Know all men by these presents that we, F. A. Raynolds, as principal, and J. F. Campbell and John Denner, as sureties, are held and firmly bound unto J. Twing Brooks, trustee, in the full and just sum of five hundred dollars, to be paid to the said J. Twing Brooks, trustee, or his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we
252 bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a term of the United States circuit court within and for the northern district of Ohio, in a suit depending in said court, between F. A. Raynolds, as plaintiff, and Cassius B. Hanna, Hattie L. Hanna, and J. Twing Brooks, trustee, a decree was rendered against the said F. A Raynolds, and the said F. A. Raynolds, having obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and a citation directed to the said J. Twing Brooks, trustee, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the twenty-first day of May next.

Now, the condition of the above obligation is such, that if the said F. A. Raynolds shall prosecute his appeal to effect, and answer all costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed)

[SEAL.] F. A. RAYNOLDS.
[SEAL.] J. F. CAMPBELL.
[SEAL.] JOHN DANNER.

Sealed and delivered in presence of witness to F. A. Raynolds, assignor—

O. D. HICKS.
J. M. DANNER.

Witness to Jno. Danner—

J. F. CAMPBELL.

Approved by—

AUGUSTUS J. RICKS,
United States District Judge, etc.

253 Which said bond had the following endorsement thereon:

No. 4743. F. A. Raynolds *vs.* Cassius B. Hanna *et al.* Bond on writ of error of appeal to the United States circuit court of appeals for the sixth circuit. Filed April 22, 1893. Irvin Belford, clerk.

Citation.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

To J. Twing Brooks, trustee, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the twenty-second day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, wherein F. A. Raynolds is complainant and appellant, and you are defendants and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and seventeenth.

AUGUSTUS J. RICKS,
United States District Judge, Northern District, Ohio.

Service of the within citation is hereby acknowledged, this tenth day of May, A. D. 1893.

ESTEP, DICKEY, CARR & GOFF,
Attorneys for J. Twing Brooks, Trustee.

254 *Clerk's Certificate.*

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

F. A. RAYNOLDS
vs.
CASSIUS B. HANNA *et al.* } No. 4743. In Equity.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of the original pleadings, records and proceedings in the above case, supplementary to transcript in this cause, under date of April 1, 1893, except orders as to new and additional undertaking in supersedeas subsequently set aside and ordered omitted, as fully hereinbefore entitled, so full and entire as the same remains of record and on file in my office, and now under my custody as clerk of said court.

In testimony whereof, I have hereunto signed my name, and affixed the seal of the said court at Cleveland, in said district, on this sixteenth day of May, A. D. 1893, and of the one hundred and seventeenth year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk*,
By JNO. VAN NOSTRAU,
Deputy Clerk.

255 SATURDAY, *June* 17, *A. D.* 1893.

BROOKS, Trustee,
v.
F. A. RAYNOLDS. } No. 110. Before Taft, Lurton, Severens.

This cause coming on for hearing is argued by counsel for respective parties in part.

SATURDAY, *June* 19, *A. D.* 1893.

BROOKS, Trustee,
v.
F. A. RAYNOLDS. } No. 110.

This cause again coming on is argued by counsel of respective parties and submitted.

256 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1893.

J. TWING BROOKS, Trustee, etc.. } No. 110.
v.
F. A. RAYNOLDS.

Appeal from the circuit court of the United States for the northern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs and bill dismissed.

257 United States Circuit Court of Appeals for the Sixth Circuit.

J. TWING BROOKS, Executor and Trustee of Robert Hanna, Deceased, } No. 110.
vs.
F. A. RAYNOLDS.

Appeal from the circuit court of the United States for the northern district of Ohio.

Before Taft and Lurton, circuit judges, and Severens, district judge.

The appellee, F. A. Raynolds, recovered in 1888 a judgment in a court of law for $44,941.60 against Cassius B. Hanna and his wife, Hattie L. Hanna. An execution issued and has been returned *nulla bona*. Upon this footing this bill was filed to subject an alleged equitable interest arising under certain trusts created by the will of Robert Hanna, father of Cassius. The executor, J. Twing Brooks, denies that Cassius Hanna has any estate or interest under the will of Robert Hanna, which may be subjected by his creditors. The circuit court held, on final hearing, that Cassius had an equitable interest, until the final distribution of the estate of Robert Hanna, in an undivided one-fourth of the net income thereof, which might be subjected to the payment of the complainant's judgment.

Both parties appealed, the complainant contending that Cas-
258 sius has an undivided half interest in the income which may be subjected by his creditors; the executor insisting that he he has no interest under the bill which can be subjected by complainant.

The clauses of the will, which bear upon the questions for consideration, are these:

"Item 4. Excepting the household articles devised to my wife in foregoing item three, I devise and bequeath to my executor hereinafter named, in trust, to be disposed of by him as hereinafter provided, all my property, real and personal, of any and every descrip-

tion, wherever the same may be situated, and however my interest or title in the same evidenced, I hereby giving my said executor full, ample and complete power to manage, direct and control the same, and every part thereof, according to his own best judgment and discretion; also to rent, sell or improve the whole or any part of my real estate, and in such manner and upon such terms and conditions as he may think best; and in case of sale, either at public or at private sale, as he may deem best, and to make, execute and deliver deed or deeds in fee for the same, I also hereby authorize and empower him to dispose of, whenever in his judgment it will be best for my estate so to do, any and all of my personal property, stocks, bonds, chattels of every kind, either at public or private sale, and to invest and from time to time reinvest in such manner and in such property, whether real or personal, as he may deem best, the proceeds arising from the rent or sale of my real, and the income or sale of my personal estate, and in case of purchase of real estate by him as aforesaid, I direct that the title to the same be taken to himself as executor and trustee of my estate, it being my wish and purpose to invest my executor hereinafter named with power to manage and control my entire estate according to his own judgment and discretion, the same as I could do myself, if living,
259 and subject only to and be restrained by the special limitations herein imposed and expressed by me.

"Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son Cassius shall so request, to purchase a home for him at a cost not to exceed twelve thousand dollars, taking title to himself as executor and trustee as aforesaid; the same to be kept as and for a home for Cassius, free of rent, so long as he desires so to occupy the same. But in the final settlement of my estate, as hereinafter provided, I direct that the money expended by my executor in insurance, taxes and assessments on the home so occupied by Cassius, together with six per cent. interest per annum on the cost of said home, for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid to Cassius, or his children, as is hereinafter provided, or if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments and interest from the annual income that is to be paid to Cassius or his children, as hereinafter provided, he is hereby authorized and directed so to do.

"Item 8. So far as the same is practical, in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows: First, to the payment of taxes, insurance, assessments and repairs that may be levied or become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including the compensation hereinafter provided to be paid to my executor. Secondly, to the payment of the annuity of two thousand dollars hereinbefore provided for my wife Harriet A. Hanna. Thirdly, after the payment of the items hereinbefore mentioned, I desire the remainder of the yearly income or increase of my estate that shall

be collected or received to be divided into two equal parts;
260 one part to be expended by my said executor for the benefit of my son Cassius and his family, so long as he, Cassius, shall live; or, in case my said executor deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly income of my estate (subject, however, to the deduction hereinbefore provided to be made of insurance, taxes, assessments and interest on the cost of the home to be provided for him as mentioned in item 7) to my son Cassius in cash. The other of the said equal parts of which the net yearly income of my estate is to be divined as provided in this section, I direct my executor to expend, for the benefit of the children of my deceased daughter, Arrial T. Whitaker, in such manner that each of the children shall have an equal and the same portion of said part with the other. In case any of said children of my daughter Arrial should die without issue before the final division of my estate, then the share of the income of my estate of such child or children so dying shall be divided between the other children of my daughter Arrial, or the issue of them, they in such to take *per stirpes* and not *per capita*, and in such case any of the said children of my daughter Arrial should die before the final distribution of my estate, leaving issue, I direct that the share of the income of my estate, which should be coming to such child of Arrial, if living, shall be paid to the issue of such child, share and share alike, and I hereby authorize my executor to pay in cash, if he shall deem best, the whole, or any part of such share of the income of my estate as may be due to each of the children of my daughter Arrial as aforesaid, he to take, in such case, the receipt of the guardian or such other person, who, for the time being, may be charged with the care or custody of said children, or either of them, for any payment so made; and in the expenditure of income for the benefit of my son Cassius and his family, as well as
261 for the children of my daughter Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life, and if in the judgment of my said executor the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution.

"Item 9. I will and direct that my executor shall continue to control and manage my estate and distribute and invest the annual income of my estate as hereinbefore provided, from year to year, until the youngest child of my daughter Arrial, then living, shall come of age, or until such further period as in his opinion the welfare of my son Cassius or of my grandchildren will be thereby promoted and whenever it shall so seem prudent to my executor, but in no event until then. I authorize and direct him to divide

and distribute the whole of my estate among my grandchildren, share and share alike, to each that may be living at the time of such distribution, or if before such final distribution any of my said grandchildren shall have died, leaving issue, the issue of such deceased grandchild shall take the share that would be due to such grandchild, if he or she were living, share and share alike. And I hereby authorize my executor, if at any time it shall seem suitable and prudent to him, to advance any portion of the final share of my estate to either of my grandchildren that would be due to them under the plan of distribution herein provided, and in such final settlement I direct my said executor to invest a portion of
262 the share hereinbefore provided for each of my grandchildren in a home for such grandchild, in which said child shall have a life estate, with the remainder to his or her heirs, it being my wish and purpose that each of my said grandchildren shall be secured in a home beyond any contingency during the period of his or her life. Provided, however, that such final distribution of my estate shall in no event be made during the lifetime of my wife, Harriet A. Hanna, nor shall advances be made to my grandchildren, as hereinbefore provided, to such an extent as to impair the annuity of two thousand dollars, which is to be paid to my wife as aforesaid, and provided, further, that before any such advances are made, or before any advances are made as hereinafter provided may be made, to my son Cassius for the benefit of himself and his children, and in any event before the final distribution of the principal of my estate, as aforesaid shall be made, I wish and direct my executor to ascertain the amount of advances of money I shall have made during my lifetime to my son Cassius in excess of what I shall have made to my daughter Arrial, or to her and to her children together, and deduct the amount of such excess as it may exist at the time of my death, interest at the rate of six per cent. per annum being added thereto from the time of my death, from the sum total of my estate, which amount so deducted shall be divided equally between the children of my daughter Arrial and their issue *per stirpes*, it being my wish thus to equalize between my children and the descendants of each of them the benefits of my estate.

"Item 10. In order to encourage my son Cassius to habits of business and economy, and to acquire a proper regard for property and its value, I hereby authorize my executor, in case he shall deem it prudent and proper so to do, but in no event otherwise, to make advances from the principal of my estate to my son Cassius
263 for the benefit of himself and his family in such amounts and at such times as to him, my said executor, shall deem it prudent and safe; but in no event shall such advances be made to such an extent as to impair the annuity herein provided for my wife, nor shall they be so great in amount as combined with the excess of advances made to him during my lifetime over those made by me to my daughter Arrial or to her and her children together; interest from the time of my death being added thereto at six per cent. per annum would amount to one-half the principal

sum of my estate, and provided that the amount of any advances, as aforesaid, that may be made to my son Cassius by my said executor shall be deducted by my said executor from the amount that would be due to the children of my son Cassius under the foregoing plan of the final distribution of my estate mentioned in item nine of this, my will."

Also the following items of the codicil to said will:

"Item 1. Believing it to be for the best interest of my estate and of all those who are or may be interested in the same, I do hereby revoke, cancel and annul the whole of item 10 in said will beginning with the words, 'in order to encourage' and ending with the words, "Item nine of this, my will," and I hereby declare said item ten (10) and every part thereof to be no longer any part of my said last will and testament.

"Item 2. In order to settle definitely and make forever free from dispute that portion of item eight (8) of my said last will, which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son Cassius and his family, is to be so expended for his benefit only until the time ar-
264 rives for the final distribution of my estate which shall be made under the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, 'so long as he, Cassius, shall live,' to be modified and controlled; also that the one-half of the said annual income which is to be expended for the benefit of Cassius, as aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust to the end that the same may be applied as my said executor shall deem best, and not otherwise for the benefit of my son Cassius and his family. Also, that any portion of said share of income which may be invested for the benefit of Cassius shall likewise be held and kept in his possession in trust by my said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise.

"Item 3. Unless my executor shall have sooner made a final distribution of my estate under the powers granted in my said will, I hereby will and direct that such final distribution be made as soon as may be, after the death of my son Cassius, provided at that time the youngest child of my daughter Arrial, then living, shall have reached the age of majority.

"Item 5. In event that my son Cassius should have no children living, nor grandchildren living at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession one-half of the whole estate as it may then exist and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and at the death of

"as announced by the testator himself to settle definitely what might otherwise be a ground of dispute between beneficiaries."

If the whole of the item is read together, it will be most apparent that the testator was dealing with the question as to the duration of the scheme for the distribution and expenditure of the annual income.

Item eight (8) of the will had directed that the one-half of the net income of the estate should "be expended by my said executor for the benefit of my son Cassius and his family so long as he, Cassius, shall live."

By item 9 of the will the executor is directed to continue to control and manage the estate and distribute the income as before directed "until the youngest child of Arrial, then living, shall come of age," when he is directed to divide and distribute the whole of the estate among the grandchildren of the testator, share and share alike, etc., etc. The same clause gave to the executor the power to postpone this division "if, in his opinion," the welfare of his son Cassius, or of his grandchildren, should be thereby promoted until such time as he should think "prudent," "but in no event until then."

By another provision of the same item a distribution might
269 be hastened by advancing to any grandchild a part or the whole of the share to which such grandchild should be entitled, provided such advancement should be deemed suitable and prudent to the executor and subject to the further provision that the final distribution should not be hastened so as to occur before the death of the testator's widow, nor advancements made to individual grandchildren during her life which should impair or affect the annuity provided for the widow. Thus, by item nine (9) the final distribution of the estate might be made in the discretion of the executor at any time after the death of the widow or at the arrival at age of the youngest daughter of Arrial, or any time thereafter, if the executor saw fit to postpone it. But by item three (3) of the codicil a final distribution was required at the death of Cassius, provided the youngest child of Arrial was then of age.

When such final distribution should occur it would, of course, terminate the trust for the benefit of "Cassius and his family" out of the income. This distribution might occur before the death of Cassius. Yet, by item eight (8) the income was to be distributed so long as Cassius should live. This was a contradiction. This is the doubt settled by item second (2) of the codicil.

To make clear the duration of this expenditure for the benefit of Cassius and his family the testator, by the codicil, declared that: "In order to settle definitely and make forever free from dispute that portion of item eight (8) of my said last will, which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be (my) wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son Cassius and his family is to be so expended for his benefit only until the time arrives for the

final distribution of my estate shall be made under the pro-
270 visions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit 'so long as he, Cassius, shall live,' to be modified and controlled."

The testator obviously meant that this income "is to be so expended for his benefit only until the time arrives for the final distribution," as fixed by item nine (9) of his will. "Only" qualifies the duration of the expenditure for "his benefit," and should be so punctuated and read. The words "for his benefit," in same clause, refer to him as the head of his family, and are not intended, when read with the context, to limit the benefit of the expenditure to him personally.

We are, upon these considerations, clearly of opinion that the "family" of Cassius are express objects of the testator's bounty, and have the same interest in the income that he has.

The second proposition as to the construction of the will is presented by a most learned and able opinion by the circuit judge who heard the case below. The view taken by the judge is comprehended in his conclusion that "there is nothing to indicate that it was the intention of the testator to limit and confine the application of the trust fund to the personal support of the designated beneficiaries; on the contrary, it clearly appears that the provision was for their general benefit." He also thought that in a case where the income was applicable to the "general benefit" of the *cestui qui trust*, that the interest of each was separable and apportionable, and was such an interest as could be subjected by creditors of any of the beneficiaries. As to the method of apportionment, he said:

"How the trust fund in question should be divided between
Cassius and his children is a matter not free from doubt or
271 difficulty. Taking an equitable view of it, the apportionment should be made between them as to assign or allot one-half thereof to Cassius and one-half to his children, thus making Cassius' share from the net yearly income of the estate one-fourth of the whole."

We find ourselves unable to adopt these conclusions. If the interest of Cassius is apportionable and is subject to attachment, then *a fortiorari*, it must be one which is alienable. If alienable and attachable, then it must be one which he could anticipate. If an interest of the foregoing character, then what is there to prevent Cassius from demanding his proportion from the trustee in cash and enforcing his demand by suit? If he has an interest of that kind, then each of those composing "his family" have a like interest and a like right of anticipation and a like right to alien, for we have already decided in the foregoing part of this opinion that each person composing his family had an equal interest in the bounty of the testator with Cassius. When this will was made Cassius was hopelessly in debt. He was financially worthless, a confirmed spendthrift and unable to appreciate the proper use of property or its value. This state of things was well known to the testator when he made

this will. Yet Cassius was his son. He could not ignore his obligation as a father. Cassius had a wife and two sons. These were objects worthy of the testator's bounty, and their condition doubly appealed to his affection and his duty. If he gave to Cassius a child's part of his estate, he threw it to his creditors. Every word and line of the will indicates that it was written with a view to the deplorable situation of his son and the helpless dependency of that son's family. These attending circumstances may and ought to be taken into consideration in ascertaining the intent of this testator. "The interpreter may place himself in the position occupied by the testator when he made his will and from that stand-
272 point discover what was intended."

Blake *vs.* Hawkins, 98 U. S., 315.

That the dominating purpose of the testator in founding this trust was to provide for the support and maintenance of "Cassius and his family" collectively, seems to us clear when we read the will by its four corners in the light of the circumstances under which it was made.

It is hardly necessary to observe that if this was a simple gift of the interest or income of this fund, with no other limitation or qualification than that it was "for the benefit of Cassius," that it would give him a vested interest in the income.

A gift "for the benefit of another" would be a mere general expression of the motive of the testator, and would impose no obligatory limitation upon the manner of enjoyment.

Apruce *vs.* Apruce, 1 Vesey & Beome, 364.
Dawson *vs.* Hearne, 1 R. & Vesey, 606.
Ford *vs.* Battey, 17 Beav., 303.
Yates *vs.* Compton, 2 P. Wm., 38.
Re Skinner's Trust, 1 John & H., 102.
In re Sanderson's Trust, 3 Kay & J., 497.
Henson *vs.* Wright, 88 Tenn., 507.

In the case last cited the devise was to a trustee of land. The trustee was directed to hold said lands "for the benefit of said W. A. Hamilton only and to account to him for the rent or yearly issues of said land" "for the only proper use and benefit of him, the said W. A. Hamilton, for and during his natural life." The trustee and beneficiary united in a conveyance of the lands for the life of said Hamilton, there being a valid devise over to others at his death. This conveyance was sought to be set aside upon the ground that the trust was one for the maintenance and support of the beneficiary, and that the power of alienation was therefore withheld by implication as repugnant to the purposes of the testator. The
273 Tennessee court said: "These words do not limit the interest of the *cestui qui trust*, to a support and maintenance or declare the object of the trust to be to make provision for his support. They only operate to declare a distinct trust for the sole and only 'benefit' of Hamilton during his life.

A trust may be so created that no interest vests in the beneficiary,

as, when it is limited to the support and maintenance of the beneficiary and he is prohibited from alienation or anticipation. So, when the income is to be paid over only in the discretion of the trustee, or when it can only be applied for a special use, such as education or support. In all such cases the purposes of the trust would obviously be defeated if the beneficiary could assign or alienate. But whenever the absolute equitable interest is vested in the *cestui que trust*, and there is no prohibition upon his power of alienation, the incidents of ownership attach and the interest is assignable."

"It is difficult to see," said that court, "how this trust would be breached by an assignment of the rents accrued or to accrue. These rents would, in such case, have been applied to the 'only use and benefit' of the beneficiary just as effectually as if paid into his hands."

But here we find the words, "for his benefit" qualified and direction given as to how it should be used "for his benefit:" how expended and applied. The subsequent limitations which operate, read in the light of the surroundings under which the will was made, to so qualify this gift as to cut it down to one for maintenance and support, are found when we consider these circumstances.

1. The income was not to be paid into the hands of Cassius, save in the absolute discretion of the trustee, but was to be "expended" by the trustee.

2. It was not to be expended on Cassius, or for his ex-
274 clusive benefit, but for "the benefit of Cassius and his family."

The "family," as a distinct unit, was in the mind of the testator, and the "family," of which Cassius is a member and the head, as an object of the testator's anxious care, is made the recipient of his bounty. Upon this "family" the income is to be "expended." Looking to the condition of Cassius, the relation he bore to the testator, the natural affection of the grandfather for the children of his son and their utter helplessness, we can read no other meaning than that by the requirement that the income shall be expended for the benefit of that son and the family of that son, that the testator meant that the expenditure should be for the support and maintenance of that family as a family and the support and maintenance of that son as a member of that family.

3. The direction that the children of this family shall be educated and maintained "on a scale comporting with their condition and rank in life" supports this view.

4. The language of the testator reposes in the executor a discretion as to whether the whole or any part of the income shall be expended for the benefit of Cassius and his family. The will is explicit as to this, and is in these words: "And if, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family and to the children of Arrial as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain after what he deems a reasonable ex-

penditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

As to this surplus a further direction is given in the second item of the codicil, by which it is provided that the one-half of the income to be "expended for Cassius and his family," shall, until
275 expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my executor may deem best, and not otherwise, for the benefit of my son Cassius and his family."

This is applicable to any surplus of income in the hands of the executor. It is to be "kept" and applied as the executor may deem "best, and not otherwise," for the benefit of Cassius and his family. That is to say, it is to continue income and subject to the same trusts. Thus the larger income of one year will help out the shorter receipts of another. The needs of one year may greatly exceed those of another, and provision is made for this possible condition by giving the executor direction to keep such surplus income for such use and purposes as may require it. Under item eight (8) of the will the executor had been required to invest any surplus "for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution." Counsel for complainant, Raynolds, read this as if it were a direction that unexpected income should become the exclusive property of Cassius, and that this interest was to be invested for Cassius, and that this, at least they might reach as subject to his debts. The better opinion, looking alone to that item, would seem to be that the testator had no such meaning. That the phrase, "for the benefit of the child or grandchild," entitled to such income "under the foregoing plan of distribution," was a mere direction that the half which was intended for the children of Arrial should be invested for their benefit, while the other should be invested for the like benefit of those entitled to it. But, however this may be, there has been no such investment. There has been and is an unexpended balance of income. This the executor holds in trust as directed by item two (2) of the codicil, already quoted.

276 By the concluding clause of this last referred to item the executor is given power, if he shall so choose, to invest the surplus income "for the benefit of Cassius," to likewise hold and keep such invested balance in trust, "the same to be expended for Cassius' benefit, or paid to him at such times and in such amounts as he, my said executor, may deem best, and not otherwise."

Until he has exercised this discretion and invested the excess for the benefit of Cassius, no interest has vested in him under this power.

Looking to both item eight (8) of the will and item two (2) of the codicil, we conclude:

1. That the executor may use his reasonable discretion as to whether the whole of the income shall be annually expended.

2. That if he does not deem it judicious to expend the whole, he

may retain in trust such surplus as unexpended income to be used afterwards by him as income for the maintenance and support of Cassius and his family.

3. That in his discretion he may invest such surplus income for the "benefit of Cassius," thus devoting it exclusively to his benefit. This power to direct surplus to the exclusive benefit of Cassius is not an imperative trust, is purely discretionary, and cannot be controlled.

4. No such power has been exercised, and there is no fund invested exclusively for the benefit of Cassius, and, therefore, no question before us as to the rights of his creditors in such an event.

We have, then, a case where the trust is for the maintenance and support of Cassius as one of the "family," collectively, the objects of the testator's bounty.

Under such a trust Cassius has no such vested separable interest as can be reached by his creditors. That which is given to him is not the income of the fund, or any separable part of the in-
277 come. The trust, apart from the absolutely discretionary powers of the executor, is for his maintenance and support. This is all that he can compel the executor to furnish. Neither can he, as a matter of absolute right, demand this separate and apart from his family. In the discretion of the executor he might be separately provided for, but he has no strict legal right to demand it. Neither is the executor obliged to use the whole income if a less sum, in his discretion, is abundant. He may provide for unexpected deficiences in the income by economy when it is not essential to use all. He may provide against unusual demands by an accumulation. If he thinks best, he may invest the whole or any part of this accumulation for the benefit of Cassius. His judgment as to this cannot be controlled so long as he acts in good faith. If he makes no such appropriation of surplus and does not afterwards use it, this surplus would follow the principal at distribution, and must go as the capital goes.

This is upon the principle as stated in Hanson *vs.* Graham, 6 Vesey, 249, "that nothing more than a maintenance can be called for; what can be shown to be necessary for maintenance, however large the interest may be; and, therefore, what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be."

To the same effect is the opinion in *In re* Sanderson's Trust, 3 Kay & J., 497. The circuit judge thought that there was neither an express or implied direction that any part of the income should follow the corpus. As to the excess, he said: "That the trustee was undoubtedly invested with a discretion as to the amount of the income he would pay over in cash or expend for the beneficiaries," and that "this discretion, so long as honestly and reasonably exercised, a court of equity could not or would not control, but
278 that the surplus or residue of the income not so distributed was required to be invested for the benefit of the *cestui que trust*, entitled." We think the learned judge did not give due weight to the effect of item two (2) of the codicil in modifying item eight

(8) as to this surplus. If he is not under obligation to invest for the benefit of Cassius, and is not under obligation to spend the whole of the interest, and if the beneficiaries can call only for maintenance, support and education, then, on the principle above stated, there is an implied direction that the unexpended and uninvested income shall follow the fate of the corpus.

It is also to be noted that there was no imperative requirement, after the widow's death, as to the continuance of this trust for maintenance. After her death the executor could terminate the trust by advancing the grandchildren their respective shares if he thought it fit and best.

Or, he could wait until the youngest child of Arrial should reach her majority, and then distribute.

The trust is not to continue for the life of Cassius, save in the discretion of the executor.

In the view we have taken of this trust, it is one under which no interest in the income has vested in Cassius. He has, therefore, by necessary implication, no power to anticipate it and none of alienation. The trust is one for a specific purpose, and is such a one as under the weight of authority neither the *cestui que trust.*, nor his creditors, nor his assignees can defeat or divert from the appointed purposes. The case of Godden *vs.* Crowhurst, 10 Sim., 643, is much in point. In brief, that case was this: The testator bequeathed his residuary estate to trustees, with direction that the interest upon it should be paid for his son for life, and after the son's death, to his wife and children. The will then directed that if the son should assign or charge the interest to which he was entitled for
279 life, or attempt or agree to do or commit any act whereby the same or any part thereof might, if the absolute property thereof was vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife or child or children he might have and for the education of such issue as the trustees should in their discretion think fit. Some years after the testator's death the son became a bankrupt. The assignee sought to recover the interest upon the fund. It was held that the trust for the benefit of the son, his wife and children was valid, and that the assignee was not entitled to any part of the provision.

The vice-chancellor, among other things, said: "That this fund, if it be given at all, is given collectively, and not distributively, for the maintenance and support of the son and any wife and child or children he may have. The word or, there, is merely addressed to children, collectively, as the substitutes for a single child. It is not a word of distribution which separates the son from the wife, or the wife from the child. I so express myself because, according to my apprehension, this is a clause in which, whatever benefit is intended, is given, collectively, to the son and the wife and the children; and it appears to me that that is the grammatical construction for the reason I have stated. Then the property is given 'for the maintenance and support of my said son and any wife and child or chil-

dren he may have, and for the education of such issue, or any of them, as they, my said trustees, for the time being, shall in their discretion think fit.' Now, there is nothing in point of law to invalidate such a gift that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied; and there might have been a maintenance of the son and
of the wife and of the children without their receiving any
280 money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance; and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children. And, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything."

Mr. Perry on Trusts, in section 386*a*, expresses the principle upon which we have proceeded. That learned author, after expressing certain views as to trusts in restraint of alienation and anticipation, not necessarily involved here, says: "But a trust may be so created that no interest vests in the *cestui que trust.*, consequently such interest cannot be alienated, as where property is given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So, if property is given to trustees to be applied by them to the support of the *cestui que trust.* and his family, or to be paid over to the *cestui que trust.* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, nor the *cestui que trust.*, nor his creditors or assignees can divest the property from the appointed purposes. Any conveyance, whether by operation of law or by the act of any of the parties, which disappoints the purposes of the settler by divesting the property or the income from the purposes named, would be a breach
of the trust. Therefore, it may be said, that the power to
281 create a trust for specific purposes does, in some sort, impair the power to alienate property."

The Supreme Court of the United States have in the clearest terms upheld trusts for the support and maintenance of a beneficiary. The case of Nichols assignee *vs.* Eaton, 91 U. S., 716, is an instructive one.

By the will of Mrs. Eaton she devised her estate to trustees, upon trusts to pay the rents, profits and income to her four children equally during life. There was a provision against alienation and insolvency by which, upon bankruptcy or insolvency, or an attempted alienation, the trust should terminate and the income go over to the wife and children of the beneficiary. That a devise of income, to cease upon insolvency or alienation, with a limitation over was good, was not a question of serious contest. Under the well-settled rule of the English courts of equity such cessor and

limitation over had been always held valid. Brandon *vs.* Robinson, 18 Vesey, 429. The controversy was over another provision by which, in case of the bankruptcy of one of the sons, without wife or children (which was the case with respect to the bankrupt whose interest was in controversy), it was provided that "it shall be lawful, but not obligatory on her trustees, to pay to said bankrupt or insolvent son, or to apply to the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened."

The contention was that this provision was designed to evade the policy of the law, which made void any arrangement by which the beneficial enjoyment was to be secured to one, free from liability for debts. It was insisted that the discretion vested in the trustees is equivalent to a direction, and that it was well known that it would be exercised in favor of the bankrupt. The court, through
282 Mr. Justice Miller, after stating that the doctrine relied upon by the assignees who sought to reach the income as an asset of the bankrupt, was opposed by the case of Twopenny *vs.* Peyton, 10 Sim., 487, and Godden *vs.* Crowhurst, 10 Sim., 642, said: "No case is cited, none is known to us which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court."

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded upon the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency and after the cessor of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right upon the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor; that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them"—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testa-
283 trix which she never made; and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hill on Trustees,

486; Lewin on Trusts, 538; Boss *vs.* Goodsall, 1 Younge & Collier, 617; Maddison *vs.* Andrew, 1 Ves. Sr., 60. And certainly they would not do so in violation of the wishes of the testator.

The case of Holmes *vs.* Penny, 3 Kay & J., 90, may be cited as fully supporting the proposition that under a trust for the maintenance of a number of persons as a family the trust is valid and no one of the beneficiaries has a separable interest.

There are many American cases holding like views; among them may be cited:

Rife *vs.* Geyer, 59 Penn. St., 393.
Wells *vs.* McCall, 64 Penn. St., 207.
Holdship *vs.* Patterson, 7 Watts, 547.
Chase *vs.* Chase, 2 Allen, 101.
Leavett *vs.* Bierne, 21 Conn., 1.
Nickett *vs.* Handley, 10 Gratt. (Va.), 336.
Perkins *vs.* Dickinson, 3 Gratt. (Va.), 335.
Davidson *vs.* Kemper, 79 Ky., 5.
Hall *vs.* Williams, 120 Mass., 344.
Slattery *vs.* Watson, 151 Mass., 266.
Joroulmon *vs.* Masengale, 86 Tenn., 88, and 92 Mo., 439; 69 Maryland, 77.

The decision has been rested upon a construction of the will, which brings the trust within the extremest doctrine of the English courts as to bequests for the maintenance and support of more than one *cestui que trust*. We do not thereby intend to be understood as assenting to the proposition maintained by those courts, that
284 the power of alienation is a necessary incident to a life estate in rents, dividends or income. That doctrine is not necessarily involved. The great weight of American authority seem to be against the extreme view of the English courts. See the cases cited above.

The decree must be reversed and remanded that the bill may be dismissed in accordance with the views herein expressed.

285 No. 110.

United States Circuit Court of Appeals for the Sixth Circuit.

J. Twing Brooks, Executor and Trustee of Robert Hanna, Deceased,
vs.
F. A. Raynolds.

Petition for Rehearing, by F. A. Raynolds, Appellee.

Filed December 4, 1893. Walter S. Harsha, clerk.

Francis J. Wing, J. Wm. Ball, Cleveland, Ohio, counsel for petitioner.

286 United States Circuit Court of Appeals for the Sixth Circuit.

J. TWING BROOKS, Executor and Trustee of Robert Hanna, Deceased,
vs.
F. A. RAYNOLDS.
No. 110. In Equity.

Petition for Rehearing.

Now comes F. A. Raynolds, appellee and cross-appellant, and petitions the court for a rehearing in the above-entitled cause, for the following reasons, to wit:

1. Because the court having held that Cassius had, under the trust created by the will, a right to support "that he can compel the executor to furnish;" it, notwithstanding, holds that Cassius has nothing which can be subjected to the claim of a creditor.

The statute of Ohio, sec. 5464, R. S., cited in the original brief, provides that any and all equitable interests may be subjected to the payment of debts.

The exemption statutes furnish the only immunity from creditors known to the law of Ohio. It follows, that the interest found by the court to have been given to Cassius, should, at least, have
287 been held subject to the judgment of Raynolds, to the extent that exemption laws would permit.

2. It is found by the court that the will directs the unexpended income to be invested for the benefit of Cassius, and yet holds that because the trustee has not obeyed this instruction, by so investing, that the amount of unexpended income cannot be subjected to the claim of Raynolds.

The disobedience by the trustee of positive instructions contained in the will, cannot properly be used as a reason for denying to Raynolds what he would have been entitled to, had such instructions been obeyed. Equity regards as done that which should have been done.

The trustee is given no discretion as to how much he may invest for Cassius, except as the amount expended for Cassius' benefit may be varied.

If there is any discretion given to the trustee, it is as to the amount to be expended, and not as to the amount to be invested.

When the trustee has exercised his discretion in expending income, the disposition to be made of the unexpended balance becomes certain and fixed.

The decision of the court seems to assume that a discretion was given to the trustee, first as to the amount of income that he should pay out for the benefit of Cassius, and then an additional discretion as to the amount of unexpended balance of income he should invest for Cassius.

Instead of this, the will directs the trustee to invest the surplus "for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

3. In the consideration of the question raised by the cross-appeal of Raynolds, the court, to support the decision, supplies the word

"family" in the second item of the codicil, notwithstanding that in a marked way it has been omitted by the testator in order to emphasize the change intended to be made in the provisions of the will.

288 By the will the testator had given to Cassius and his family one-half of the income, so long as Cassius might live; by the codicil the interest of Cassius is limited, in time, to the settlement of the estate, and the power to advance to him out of the principal is withdrawn, and, as a compensation, the income is given to Cassius alone, during this limited time, by omitting the word "family."

While it is true that in wills, as in other instruments, words may be supplied which the context demands, it seems unprecedented that additional beneficiaries should be added to those named by the testator.

4. It is assumed in the decision that because Robert Hanna knew that Cassius was in debt, he intended to make a will which would defeat any attempts of creditors to collect their claims.

In the first place, this assumption is without foundation in common experience. Happily such experience teaches that comparatively few fathers are of such a character that simple knowledge of the existence of an honest debt begets a desire that it should not be paid.

We have further the following testimony of Brooks, trustee, (Record, page 96), in answer to a question propounded by counsel for the trustee:

"Q. Prior to the execution of this will, what statement, if any, did Robert Hanna, the testator, make to you or in your presence, upon the subject of the financial condition of Cassius B. Hanna, or his ability to keep and care for property?"

"A. He told me, when the subject of the drawing of his will was introduced, that his son, Cassius B. Hanna, had large debts over him, and always had had, and that he knew that he never could take care of property enough to even have a home, so far as the boy himself was concerned. Therefore, he wished me to draw his will in such a form as to at least make sure of his having a home,

289 and tie it up in such a shape that his creditors could never get it."

It is thus shown by positive testimony introduced by the trustee, that the only effect upon the testator which the knowledge of the indebtedness of his son had, was a desire that a home should be provided for him which should be kept from creditors.

This home has been provided and has been kept free from creditors.

No reference whatever is made in the will to the fact of Cassius being in debt, and no purpose connected therewith is expressed.

Counsel much desire to be heard orally and by brief.

FRANCIS J. WING,
J. WM. BALL,
Counsel for Petitioner.

We hereby certify, that we are counsel for the said F. A. Raynolds, appellee, and that the statements of fact in the foregoing petition for rehearing are true, and that in our opinion, said petition for rehearing is well founded in law.

FRANCIS J. WING,
J. WM. BALL,
Counsel for Petitioner.

290 MONDAY, *February* 5, A. D. 1894.

BROOKS, Trustee,
v.
F. A. RAYNOLDS. } No. 110.

A petition for rehearing heretofore presented in behalf of the defendant having been fully considered by the court is now here denied.

291 United States Circuit Court of Appeals for the Sixth Circuit.

No. 110. October Term, 1893.

J. TWING BROOKS, Executor and Trustee of the Estate of Robert Hanna, Deceased,
vs.
F. A. RAYNOLDS. } Appeal from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

On petition for rehearing.

(FEBRUARY 5, 1894.)

By LURTON, *Circuit Judge:*

A petition for rehearing has been presented and fully considered The points made are four in number:

The first calls attention to section 5464, Revised Statutes of Ohio, and insists that under that section any interest of Cassius Hanna in the trust created by his father's will, though such an interest be nothing more than a support and maintenance, is subject to the demands of his creditors.

That section is in these words:

"When a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee, or otherwise, or any interest he has in any banking, turnpike, bridge, or other joint stock company, or in any money contract, claim or chose in action, due or to become due to him, or in any judgment or order, or any money, goods or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action."

This statute was not deemed to have any application to a trust where the beneficiary had no right to demand any distributive part of the income, and under which the trustee was to apply and personally expend the income in the maintenance and support of the

debtor as one of a family collectively to be maintained. The trustee in his discretion might pay over the income in whole or in part. That discretion could not be controlled. The trust, as we construed it, gave the trustee the right to refuse to Cassius a separate support, and it gave him the absolute and uncontrolled right to refuse to pay over a dollar of the income in money.

If we were right in the construction we placed upon this trust, it is within the principle of Godden *vs.* Crowhurst, 10 Sim., 648; Holmes *vs.* Penny, 3 Kay & J., 90; Hill *vs.* McRae, 27 Ala., 175; Hall *vs.* Williams, 120 Mass., 344, and Nichols *vs.* Eaton, 91 U. S., 716.

In Godden *vs.* Crowhurst, *supra*, the vice-chancellor said concerning a trust in this respect like the one under consideration:

"Now there is nothing, in point of law, to invalidate such a gift; that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied, and there might have been a maintenance of the son and of the wife, and of the children without their receiving any money at all. For instance, the trustees might take a house for their lodgings, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance; and
292 therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son, simply, but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children; and, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything."

The right to acquire and receive a support in kind, as one of a household or family, is not an interest which is capable of severance or valuation, and is not such an equitable estate or interest in property as can be subjected. In no view of the Ohio statute can a creditor be benefited. But this Ohio statute ought not to be construed as relating to or dealing with the substantive laws of property. It is found in the code of civil procedure, and it should be regarded as extending the remedy of creditors to property and property interests not subject to seizure by execution at common law on account of the narrowness of the common-law writ.

At common law the writ of execution was limited in its operation, and was, in addition, confined to those estates recognized by the law as legal estates. Choses in action, and equitable interests, were not subject to common-law writs. On account of this the jurisdiction of equity to entertain suits in aid of a creditor had its origin.

3 Pom. Eq., sec. 1415.

Statutes have been enacted in many States extending common-law remedies and enlarging equitable jurisdiction in creditors' suits. This Ohio statute is one of this class.

The interest which Cassius has under this trust is not enlarged or otherwise affected by the Ohio statute. The interest which the debtor, Cassius, has in the trust is not one which can be reached and subjected by a creditor, either at law or at equity.

Another point made in the application for rehearing deserves consideration. The insistance is that income at the end of each year remaining unexpended is absolutely required to be invested for the benefit of Cassius, and that surplus is absolutely the property of Cassius, and therefore subject to his creditors. The view expressed in the opinion was that the executor had a discretion as to whether he would hold such surplus for the common benefit, or invest the same under the provisions of the eighth item of the will. That having made no such investment he could not be coerced.

The disobedience of the executor to a positive direction to invest such surplus, would not operate to diminish the rights of Cassius or his creditors in the fund.

If there was a surplus and it was the duty of the executor to invest it, then the share of Cassius in the surplus is just as much subject to the claims of his creditors as if it had been invested. Thus far we agree with the counsel for petitioner. Did the executor have any discretion as to when and how much of such surplus income he would invest?

1. It is too clear for argument that the executor had the power to have expended the whole of such income as it came to hand and thus have prevented the accumulation of a surplus.

2. He might have advanced to Cassius or his family, if he saw fit, such unexpended current income.

3. Under item nine the executor was given power to advance at any time "any portion of the final share of my estate to
293 either of my grandchildren that would be due to them under the plan of distribution herein provided," subject only to the provisions made affecting the testator's wife. "In other words," quoting brief of counsel for the executor, "the executor may, in his discretion, at any time after the death of the widow, advance the entire estate to the grandchildren, and at any time prior to her death, advance to them all, except sufficient to raise her annuity." The provision, whereby the executor in his discretion might turn over to others the whole of the estate out of which the income of Cassius was to arise, was not only inconsistent with the suggestion that the interest of Cassius in the income was a vested one, but serves to establish the proposition that the power to invest surplus income was a discretionary power. If we confine ourselves to the closing paragraph of item eight of the will, it might well be contended that the executor had no discretion as to such surplus. But if we look at the will as a whole, and endeavor to ascertain the intent of the testator, we are led to the conclusion that the testator did not arbitrariiy require the unexpended income to be invested for the benefit of Cassius or Cassius and the members of his family. No power is anywhere given by the eighth item to trench upon such investments. If, however, we turn to item two of the codicil, we see that unexpended income is to be held in trust "until expended or otherwise disposed of as provided in said item;" "to the end that the same may be applied as my said executor shall deem best, and not otherwise, for the benefit of my son, Cassius and his family." Speaking of the

investment authorized by item eight, the testator continues by adding:

"Also any portion of said share of income which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise."

The interest of Cassius in such investment, is that "portion of said share of income which may be invested for the benefit of Cassius." What is that portion? It is clearly not the whole of the unexpended income of one-half of the estate. The family of Cassius had interests in the income; each member an interest equal to that of Cassius. The testator did not contemplate that the whole of such surplus income should be invested for the exclusive benefit of Cassius. He speaks of the interest of Cassius "as any portion of said share." The share he refers to is the one-half of the net income set apart as a fund out of which the executor was to expend the whole, or as much as he deemed judicious, for the support of Cassius and his family. The interest of Cassius is to be that "portion" of the surplus of that share which the executor shall invest for the benefit of Cassius exclusively. How is the portion of Cassius to be ascertained and separated from the portion to be held for the benefit of the others who compose his family? Looking to the whole scope of the will we must conclude that this is, as is everything else beyond maintenance, left to the sound and uncontrolled discretion of the executor. He may pay over to Cassius, if he see fit, the whole of the share of income out of which he and his family are to be supported. This discretion is, as we have already seen, personal and beyond legal coercion. It is easy, therefore, to gather that the executor has a discretion as to what shall be set off for investment
294 exclusively for the benefit of Cassius. What shall be the fate of the portion invested for Cassius?

1. It is to be observed that the executor is given the evident discretion as to the manner in which such fund shall be used.

a. He may expend it for his benefit.

b. Or he may pay it over to him in such sums and at such times as he may deem best, "but not otherwise."

c. If it be neither expended nor paid over, then what? Will it pass to the distributees of Cassius, or under his will? Not one word occurs giving Cassius any further or other interest than such as the executor chose to give. The fund is to remain in the hands of the executor until he pays it over to Cassius or expends it for his benefit, or until the day of final distribution. It will then constitute unexpended income, and as such pass with the corpus of the estate. The beneficiaries having no other interest in the income than a right to maintenance, have not a vested interest in the income. They are to be supported out of the income. The executor may spend so much as he deems proper. The rest not being given to the testator, is *per necessitati* when the trust ceases, to be held and distributed as part of the corpus. This is what the testator understood, when in

the ninth item of the will and the fifth item of the codicil, he directs, upon the termination of the trust, a distribution of the "whole of my estate," or the "whole of my estate as it may then exist." The fair and rational interpretation of item eight, so far as it refers to the duty of investment, when construed in the light of the purpose of this testator as manifested by surrounding circumstances, and in the light of the whole scope of the will, particularly the second item of the codicil, was to make the investment of surplus income a matter of discretion not to be controlled by the court.

The other points suggested in the application for a rehearing have all been heretofore passed upon, and are covered by the opinion.

Rule 29 provides that a petition for rehearing shall briefly and distinctly state its grounds, "and will not be granted or permitted unless a judge who concurred in the judgment desires it, and a majority of the court so determines." It may be added, that when such reargument is desired it will be ordered without waiting for the application of counsel.

Public Schools *vs.* Walker, 76 U. S., 603.

In the case above cited the chief justice said, as to such petition, that:

"When the court does not, of its own motion, order a rehearing, it will be proper for counsel to submit, without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point, or points, thought important. If upon such suggestion any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course."

That practice has been followed in the present case. The points upon which counsel have suggested a reargument have been considered. In view of the fact that each point was fully presented, both in oral and printed arguments, we are of opinion that no benefit would result from further argument.

Petition dismissed.

295 United States Circuit Court of Appeals for the Sixth Circuit.

I, Walter S. Harsha, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing pages, numbered from — to —, inclusive, contain a true copy of the record, supplemental record, decree of reversal, opinion by Judge Lurton, petition for rehearing, order denying petition, and opinion by Judge Lurton thereon, in the case of J. Twing Brooks, executor & trustee of the estate of Robert Hanna, deceased, appellant, *vs.* F. A. Raynolds, appellee, No. 110, October term, 1893, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of Cincinnati, this 28th day of February, A. D. 1894.

WALTER S. HARSHA,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed]: United States circuit court of appeals for the sixth circuit. J. Twing Brooks, executor, &c., *vs.* F. A. Raynolds. Clerk's certificate.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1147.

J. TWING BROOKS, EXECUTOR AND TRUSTEE OF ESTATE OF ROBERT HANNA, DECEASED, APPELLANT,

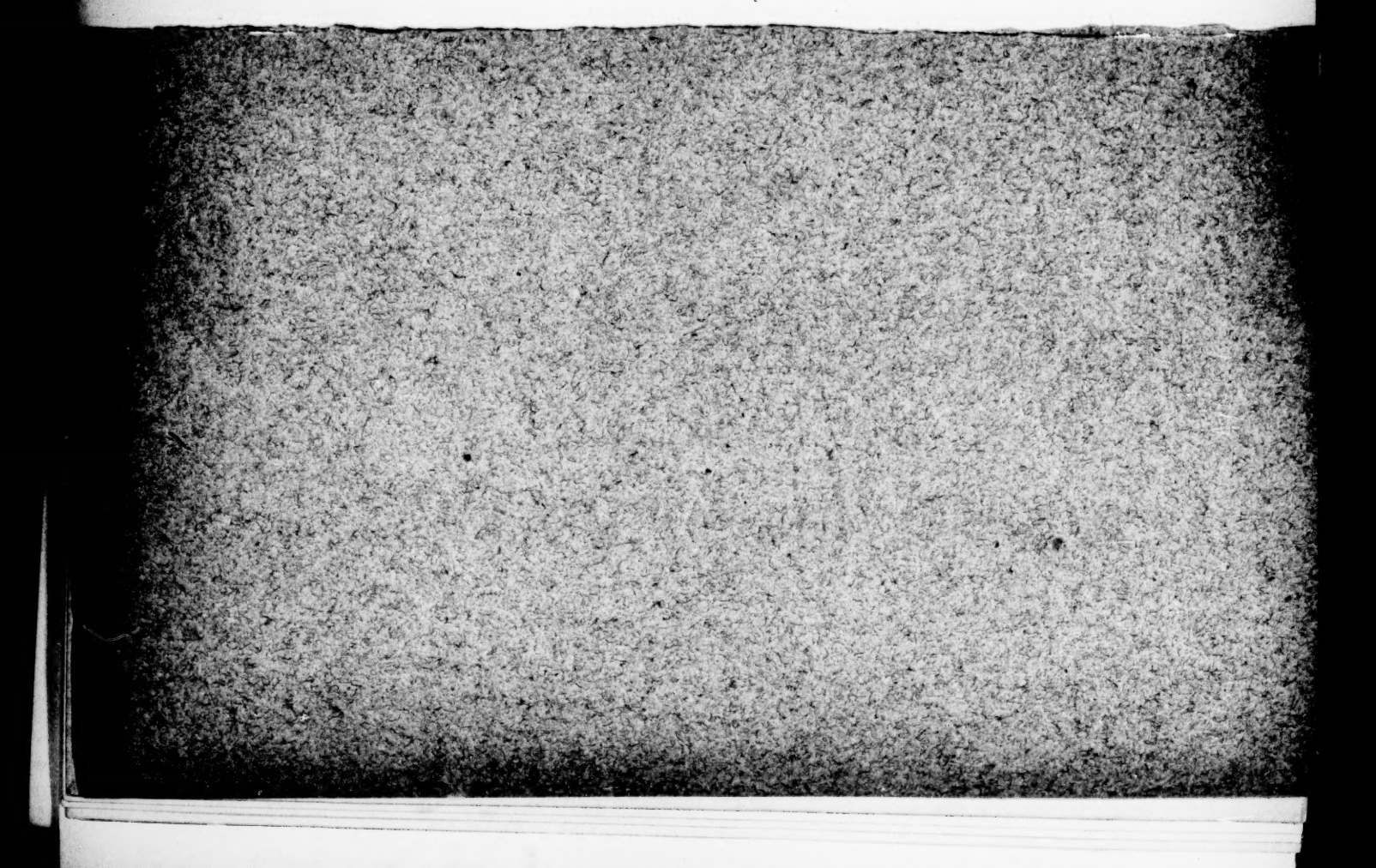
vs.

F. A. RAYNOLDS.

PETITION OF F. A. RAYNOLDS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FRANCIS J. WING,
For Petitioner.

(15,531.)



IN THE

Supreme Court of the United States

F. A. RAYNOLDS

vs.

J. TWING BROOKS, EXECUTOR AND TRUSTEE OF ROBERT HANNA, DECEASED.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Sixth Circuit to Certify to the Supreme Court for its Review and Determination the Case of J. Twing Brooks, Executor and Trustee of the Estate of Robert Hanna, Deceased, Appellant, vs. F. A. Raynolds, Appellee and Cross-appellant.

To the Honorable the Supreme Court of the United States:

The petition of F. A. Raynolds respectfully shows to this honorable Court as follows:

Your petitioner is a judgment creditor of Cassius B. and Hattie L. Hanna in the amount of forty-four thousand nine hundred and forty-one dollars and sixty cents ($44,941.60), with interest thereon from the 2d day of April, 1888.

That by his last will and testament Robert Hanna, deceased, left all of his property, real and personal, to J. Twing Brooks, in trust for certain beneficiaries, among others, to Cassius B. Hanna, by directing the said trustee to pay for benefit of said Cassius B. Hanna one-half of the net income

arising from said estate during the life of said Cassius B. or until final distribution of the estate.

A bill was filed by said F. A. Raynolds in the circuit court of the northern district of Ohio, eastern division, the purpose, object, and prayer of which was to subject to the payment of his judgment the interest of said Cassius B. Hanna in the estate of his father.

And afterwards such proceedings were had in said circuit court that a decree was rendered in favor of said F. A. Raynolds by which it was ordered that the interest of said Cassius B. Hanna in the income of said estate should be applied to the payment of the complainant's judgment, and a master was appointed to ascertain from testimony to be taken the condition of said estate and the amount of income derived therefrom. The master so appointed made his report, which was confirmed by said circuit court, and thereupon a decree was entered finding that said Cassius B. Hanna was entitled to one-quarter of the annual net income of the estate, and that such portion of said income should be subject to the payment of the judgment of the complainant, and thereupon the defendant, J. Twing Brooks, appealed said cause to the circuit court of appeals for the sixth circuit, and the complainant, F. A. Raynolds, filed his cross-appeal.

This cause was docketed in said court of appeals as No. 110, United States circuit court of appeals for the sixth circuit; J. Twing Brooks, executor and trustee of Robert Hanna, deceased, *vs.* F. A. Raynolds, and was heard upon such appeal and cross-appeal by said circuit court of appeals, who, upon such hearing, reversed the decree of the circuit court and ordered that the complainant's bill be dismissed.

There was no testimony taken by either parties to said cause except before the master on the issues referred to such master.

The eighth item of the will which provides for the distribution of the income of the estate is as follows:

Item 8. So far as the same is practical, in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows:

First. To the payment of taxes, insurance, assessments, and repairs that may be levied or become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including the compensation hereinafter provided to be paid to my executor.

Secondly. To the payment of the annuity of two thousand dollars hereinbefore provided for my wife, Harriet A. Hanna.

Thirdly. After the payment of all the items hereinbefore mentioned I desire the remainder of the yearly income or increase of my estate that shall be collected or received to be divided into two equal parts; one part to be expended by my said executor for the benefit of my son Cassius and his family, so long as he, Cassius, shall live; or, in case my said executor deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate (subject, however, to the deduction hereinbefore provided to be made of insurance, taxes, assessments, and interest on the cost of the home to be provided for him as mentioned in item 7) to my son Cassius, in cash. The other of the said equal parts into which the net yearly income of my estate is to be divided, as provided in this section, I direct my said executor to expend for the benefit of the children of my deceased daughter, Arrial T. Whitaker, in such manner that each of the children shall have an equal and the same portion of said part with the other. In case any of said children of my daughter, Arrial, should die without issue before the final division of my estate, then the share of the income of my estate of such child or children so dying shall be divided between the other children of my daughter, Arrial, or the issue of them, they in such (case) to take *per stirpes*, and not *per capita*, and in such case any of the said children of my

daughter, Arrial, should die before the final distribution of my estate, leaving issue, I direct that the share of the income of my estate, which would be coming to such child of Arrial, if living, be paid to the issue of such child, share and share alike, and I hereby authorize my executor to pay in cash, if he shall deem best, the whole or any part of such share of the income of my estate as may be due to each of the children of my daughter, Arrial, as aforesaid, he to take, in such case, the receipt of the guardian or other person, who, for the time being, may be charged with the care or custody of said children, or either of them, for any payment so made; and in the expenditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter, Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life, and if, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain, after what he deems a reasonable expenditure has been made, for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

And the second item of the codicil, which relates to a modification of the said eighth item of the will, is as follows:

Item 2. In order to settle definitely and make forever free from dispute that portion of item eight (8) of my said last will, which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be (my) wish and will, and I do hereby accordingly direct that the one-half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the time arrives for the final distribution of my estate shall be made under

the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit "so long as he, Cassius, shall live" to be modified and controlled; also that the one-half of the said annual income which is to be expended for the benefit of Cassius as aforesaid shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor, in his possession in trust, to the end that the same may be applied as my said executor shall deem best, and not otherwise for the benefit of my son, Cassius, and his family. Also, that any portion of said share of income which may be invested for the benefit of Cassius, shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise."

All the proceedings and holdings in said cause of the said circuit court and of said circuit court of appeals will more fully and at large appear in the certified record of said court filed herewith.

And your petitioner submits that there was error and manifest error in the holdings and rulings of said circuit court of appeals in said cause in this:

I. It used as a basis of interpretation of said will and the intentions of the testator extraneous evidence with respect to the condition of mind and the desires and purposes of said testator.

II. It found that Cassius B. Hanna had a right to a certain portion of the income of said estate, which he could enforce against the trustee, and yet held that the complainant Raynolds, as a judgment creditor, could not subject such interest to the payment of his judgment.

III. Notwithstanding the decision of this Court in the case of Nichol *vs.* Levy, 5 Wallace, p. 433, as follows: "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable to the payment of

northern district of Ohio and in the United States circuit court of appeals for the sixth circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true.

FRANCIS J. WING.

Sworn to before me and subscribed in my presence this third day of March, A. D. 1894.

[SEAL.] EDWIN L. THURSTON,
Notary Public.

[illegible]

Supreme Court

[illegible]

No. 1147

J. TWING BROOKS, Executor and Trustee of Estate of Robert Hanna, Deceased, Appellant

vs.

P. A. Reynolds

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief and Argument for Petitioner

[illegible]

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. 1147.

J. TWING BROOKS, Executor and Trustee of estate of Robert Hanna, deceased,

Appellant.

vs.

F. A. RAYNOLDS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT OF CASE.

Robert Hanna died in 1882, leaving a will and codicil by which he appointed J. Twing Brooks executor and trustee of his estate, who qualified in 1882 and has since acted as such executor and trustee.

Provision was made in the will for Cassius B. Hanna, the only son of the testator.

A judgment was obtained by F. A. Raynolds, com-

plainant below, against Cassius B. Hanna and his wife, Hattie L. Hanna, at the April term, 1888, of the Court of Common Pleas of Cuyahoga county ; execution was issued thereon and returned *nulla bona.*

The object and prayer of the bill filed herein is to subject the interest of Cassius in the trust estate left by his father, to the payment of the judgment of the appellee.

The answer of the trustee, found on page 9 of the record, sets out in full the will and codicil, and contains averments (page 16 R.) directed to the question whether or not Cassius had an equitable life interest in a certain house built by the trustee, and also the following on page 25 :

"Neither is it true that said J. Twing Brooks, as executor or trustee, holds said estate or any part thereof in any amount in trust to pay the said Cassius B. Hanna any part thereof. Neither is it true that said Cassius B. Hanna is entitled to receive from said J. Twing Brooks, as executor or trustee, one-half of the yearly income or increase of said estate of said Robert Hanna, or any part thereof. Neither is it true that the payment of any portion of the income of said estate is a charge upon the estate and assets in the hands and under the control of this defendant for the benefit of said Cassius. And this defendant denies that said Cassius B. Hanna or Hattie L. Hanna have any right, title or interest or claim to the estate of Robert Hanna or any part thereof."

A demurrer was filed to this answer which was overruled, for the reasons stated in the opinion of Mr. Justice Brown, when on the circuit, which appears on page 204 of record, as follows:

"While it is entirely possible that the court may be able to charge this estate with the payment of the plaintiff's judgment, it would be very unsafe to attempt to frame a decree upon the pleadings as they now stand, but if all the facts were laid before the court it would be able to determine at once whether the benefit, advantage or income which Cassius probably has from his father's estate, were such equitable assets as could be appropriated to the payment of this judgment. It seems to me that to enable the court to act intelligently it will be necessary for testimony to be taken and the amount and character of the assets to be fully ascertained."

At the time of filing the demurrer, April 18, 1890, a *pro confesso* order was entered against Cassius B. and Hattie L. Hanna, (Record page 20). Afterwards, on January 24, 1891, the answer of Hattie L. Hanna was filed, which simply adopts the averments and denials of the answer of Brooks, Trustee, (Record page 20).

Replications, in the prescribed form, were filed by the complainant to both of these answers.

The cause came on to be heard on the pleadings at the April term, 1893, and an interlocutory order was entered appointing a master to ascertain the condition of

the estate preliminary to decree. (Record pages 22, 23).

An exhaustive opinion was filed by Mr. Justice Jackson, which appears on page 158 of the record. Afterwards, to-wit: August 4, 1891, upon leave obtained, the defendant Brooks, Trustee, filed an amended answer.

This amended answer again sets out the will and codicil in full, and some averments additional to those made in the original answer, to the effect that Cassius from his early boyhood had been a spend-thrift, and others which are merely conclusions of law.

The master made his report, (page 36 Record) to which exceptions were filed by both complainant and defendant Brooks, Trustee.

A supplemental report was filed, (Record page 118) to which exceptions were also filed by defendant Brooks, trustee, (Record page 148.)

These exceptions were overruled and final decree entered; (Record page 149,) and a second elaborate opinion filed by Mr. Justice Jackson, (Record page 162.)

Thereupon appeal was taken to the Circuit Court of Appeals of the Sixth Circuit, where the bill was dismissed.

There is no proof in the record except that taken before the Master relative to the questions submitted to him, touching the amount of Cassius' interest, it having already been found by the Circuit Court without testimony and prior to the appointment of the Master, that

Cassius *had* an interest in the estate which could be subjected to the payment of the judgment of Raynolds.

The Circuit Court of Appeals, in the decision complained of, holds that the complainant below cannot have satisfaction of his judgment out of any portion of the income of the estate of Robert Hanna.

BRIEF OF ARGUMENT.

1. The first and principal question raised by the record is whether or not the will and codicil gave to Cassius, the son of the testator, any beneficial interest in the income of the trust estate. If this question is solved in the affirmative, then it follows as a matter of course that such interest may be subjected to the payment of complainant's judgment, and that the Circuit Court of Appeals has erred.

In Nichol vs. Levy, 5 Wallace 433-444, Mr. Justice Swayne said:

"It is a settled rule of law that the beneficial interest of the *cestui qui trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be devested and forfeited by his insolvency, with a limitation

over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."

In support of this doctrine are cited :

Graves vs. Dolphin, 1 Sim. 66.

Mebane vs. Mebane, 4 Ired. Eq. 131.

Bank vs. Forney, 2 Ired. 181.

Snowden vs. Dales, 6 Sim. 524.

Foley vs. Burnell, 1 Bro. Ch. 274.

Brandon vs. Robinson, 18 Ves. 429.

Piercy vs. Roberts, 1 Milne & K. 4.

Dick vs. Pitchford, 1 Dev. & B. Eq. 484.

2 Story Eq. Sec. 974.

In Mebane vs. Mebane, cited, it is said :

"By the use of no terms or act can property be given to a man, or to another for him, so that he may continue to enjoy it or derive any benefit from it, or have his maintainance thereout, or the like, and at the same time defy his creditors and deny them satisfaction thereout. The only way in which a creditor can be excluded is to exclude the debtor also from all benefits or interest in the property upon the contingency of his bankruptcy, as will determine his interest and make it go to some other person."

In Brandon vs. Robinson, Lord Eldon said "property may be limited to a man to go over on a certain event,

as bankruptcy, but while his property, it must be subject to the incidents of property and therefore to debts."

Story, Equity Jurisprudence, Vol. 2, Sec. 974, 974a, states this doctrine clearly.

Nichols vs. Eaton, 91 U. S., 716, only decides that "A devise of the income of property, to cease on the insolvency or bankruptcy of the devisee and to then go to the wife and children, is valid." In Spindle vs. Shreve, 111 U. S., 542, the same general doctrine that was before announced in Nichol vs. Levy, is adopted, and the question whether or not provisions in wills against the alienability, *in invitum*, or otherwise, of benefactions, are operative, is relegated to the law of *situs* of realty, or of place of performance in personalty.

In this case, both the situs of the realty, included in the trust, and the place of performance is in the state of Ohio.

There is no law in Ohio, as in some other states, exempting such trust interests from the payment of debts; on the contrary, there is express provisions of law that such equitable interests may be subjected to the payment of judgments.

Section 5464, Revised Statutes of Ohio, is as follows:

"When a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee or otherwise, or any

interest he has in any banking, turnpike, bridge, or other joint stock company, or in any money contract, claim, or chose in action, due or to become due to him, or in any judgment or order, or any money, goods, or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action."

Such a statute has been held to render inoperative a provision in a will against alienation.

Haycraft vs. Bland (Kentucky) 9 Law Rep. Ann. 599.

Marshall vs. Nash, 87 Ky., 116.

Bull vs. Ky. Bank, 12 Law Rep,, Ann. 37-41.

2 Pomeroy, Equity Jurisprudence, Sec. 536.

We submit that in the light of these authorities and many more which might be cited, and of the clear reasoning of the opinion of Mr. Justice Jackson contained in the record, it appears, conclusively, that if Cassius took any beneficial interest in the trust estate left by his father, such interest, whatever it is found to be, can be subject to the payment of complainant's judgment, even though the will prohibited alienation, which is not claimed.

II. What, if any, beneficial interest did Cassius take by the will and codicil?

Item 8 provides:

"Thirdly, after the payment of all the items hereinbefore mentioned, I desire the remainder of the yearly income or increase of my estate, that shall be collected

or received, to be divided into two equal parts ; one part to be expended by my said executor for the benefit of Cassius and his family so long as he, Cassius, may live ; or in case my said executor shall deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate (subject, etc.) to my son Cassius in cash."

This disposition of one-half the net income of the estate is absolute and without condition. No contingency is mentioned which can deprive the beneficiary of the right to have it paid to him, or them, for his or their benefit.

No condition is named, upon the happening of which, this half of the net income, or any part thereof, is to go over to some one else or to become a part of the corpus of the estate, subject to final distribution.

The direction to the trustee is certain, specific and mandatory as to the entire one-half of the net income.

He could not depart from this positive direction without committing a breach of his trust. If he should pay the designated portion of the income to the children of Arrial, or should convert it to his own use, an action would be maintainable by the beneficiary of beneficiaries, for this breach of trust, or a bill would lie to enforce it according to its terms.

Words much less definite have been frequently held

to raise an enforcible trust, as in Chase vs. Chase, 2 Allen, 101.

Property was given to a trustee "to pay the income yearly to a son for the benefit of himself and family and the education of his children." It was held that the income was taken in trust by the son as sub-trustee, and the wife and children could in equity enforce its appropriation, in part, for their support.

And, although the doctrine by which trusts have been raised from precatory words in a will, has been much limited by American courts, yet such words as "for the benefit of" are necessarily held to create an enforcible interest in the beneficiary.

In Colton vs. Colton, 127, U. S. 300, it is said in a syllabus:

2. A clause in the will by which the testator gives his wife all his estate, real and personal, and recommends to her the care and protection of his mother and sister, and requests her to "make such gift and provision for them as in her judgment will be best."—Held, under the circumstances of this case, to give a beneficial interest to the mother and sister, under the will, out of the estate given thereby to the wife, to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and to the amount of the fund.

In the will of Robert Hanna there is no discretion given to the trustee as to how much he may pay to the beneficiary ; there is a positive direction to pay yearly *for the benefit* of the *cestui qui trust* one-half the net income of the trust estate, and a privilege to the trustee, which relates more to the nature of the receipt to be taken than to anything else, to pay any portion thereof in cash.

Thus far there is, certainly, no direction given to the trustee to withhold or to divert to any other beneficiary any portion of one-half the net income set apart to be paid for the benefit of Cassius and his family or to Cassius in cash.

The next provision of the will that could in any way modify the first peremptory direction to the trustee is as follows : (Record p. 191, line 36,) " and if in the judgment of my said executor, the net annual income of my estate as above described cannot be all properly and judiciously expended or advanced to Cassius and his family, and to the children of Arrial, as hereinbefore described, I authorize and *direct* my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

Can there be any doubt that if for any reason whatever any portion of the yearly income which might, under the terms of the trust, be payable to or for the benefit of

Cassius, were at Cassius' death left unexpended for the designated purpose, it would form a part of Cassius' estate, and be distributed as such ?

An affirmative answer to this question would be conclusive of the first question raised by appellant, in favor of appellee.

There is surely no intention of the testator disclosed by the will or suggested by counsel, to permit the trustee to withhold or divert from the children of Arrial the other one-half of the income of the estate, apportioned to them, and yet the provision above quoted applies to them as well as to Cassius.

The language "*child* or grandchild who would be entitled to it under the *foregoing* plan of distribution," clearly relates, in the word "child" to Cassius, since he was the only living child of the testator; and in the words "*foregoing plan of distribution*," to the distribution of *income*, since no plan of distribution is suggested for the *corpus* of the estate until item 9 is reached.

We must conclude then, that no power, discretionary or otherwise, is given to the trustee to in any way depart from the plan of *apportionment* of income, directed by the language first quoted from the will, and that apportionment would give to "Cassius and his family" or Cassius alone, one-half thereof, so long as Cassius may live.

Item 9 relates only to the division of the Corpus of

the estate, and does not concern the question raised herein.

Item 10 may be of some use in interpretating the will, but is of no active force, since it is revoked by item 1 of the codicil.

Items 11 and 12 have nothing to do with the question before the court.

Item 13 fixes the compensation of the trustee and authorizes him to reimburse himself for expenses, and shows conclusively, if that were necessary, that he has no beneficial interest in the trust other than such compensation.

Item 14 does not bear upon the questions under discussion.

The will is complete with this item. The first item of the codicil, which is dated about five years later than the will, and a year previous to the testator's death, revokes item 10 of the will, and deprives the trustee of power to make advances to Cassius out of the body of the estate, but has no relation to the distribution of the income.

Item 2 of the codicil purports to have for its object "to settle definitely and make forever free from dispute" the portion of item 8 which relates to the division and distribution of the annual net income, but in no way attempts to give discretionary power to the trustee to withhold any part of the income payable to Cassius, or

to make less positive, the instruction found in item 8, that one-half the net income shall be paid yearly to Cassius and his family or to Cassius himself, in cash.

Item 3 relates to the final distribution of the estate after Cassius' death.

Item 4 revokes all provisions of items 8 and 9 of the will which relate to charging annual interest on the excess of advances made to Cassius in the life time of the testator.

Item 5 relates to the possible event of Cassius' having no children or grandchildren, and the effect of that circumstance upon final distribution.

And so ends the whole testamentary provision of the decedent.

There is no limitation upon, or change in, the first positive direction to the trustee to expend one-half of the yearly net income for the benefit of "Cassius and his family" in anything that appears in the will proper.

The change made by the codicil to the effect that this half of the net income must be expended for the "benefit of Cassius, only," is plainly for the purpose announced by the testator himself, to settle definitely what might otherwise be a ground of dispute between beneficiaries.

Neither in the will or codicil is there any indication, express or implied, of intention of the testator to exclude creditors, nor is there any direction given the trustee to

use the one-half of net income for any other purpose, in whole or in part, than that plainly expressed in the trust, to-wit, for the benefit of Cassius.

The testator is careful, by the various provisions, to keep the income separate from the body of the estate, careful direction is given, in the event that any portion of the income is left unexpended, yearly, that it must be kept for the purpose of carrying out the trust impressed upon the *income* as distinguished from the body of the estate.

The only ground upon which the court rests its decision, that Cassius is given no interest by the will which can be subjected to the payment of a creditor's judgment, is that the amount to be paid to Cassius rested entirely in the discretion of the trustee.

We have seen by the quotation from the eighth item of the will, that the only discretion given to the trustee was as to whether he should pay for the benefit of Cassius or to him in cash. The trustee has no beneficial interest in the estate. There is no provision that income, not paid to Cassius, shall form a part of the body of the estate ; on the contrary, there is a careful provision that the income shall be kept entirely separate from the *corpus*.

There is no provision for the going over to any one else than Cassius of any income, not paid to him or for his benefit.

There is no provision in the will making it a part of the trust to keep the income payable to Cassius from creditors.

The facts present none of the circumstances which are always held necessary to defeat the rights of a creditor.

In Nichols, assignee, vs. Eaton, *supra*, there was express limitation over in the event of bankruptcy or insolvency, etc., and a suggestion that it might "be lawful for my said trustees, in their discretion, *but without its being obligatory upon them*, etc.," to pay some portion of the income to the beneficiary.

Even the cases in Pennsylvania, of which Norris vs. Johnston, 5 Barr, 289, is a sample, and which departs further from the long established rules of law and equity, than any found elsewhere, require that there shall be in the will some direct expression of an intention to create a trust by which the property shall be so held by the trustee that the creditors of the beneficiary shall not get any benefit therefrom, in order to accomplish what it is claimed, Robert Hanna, wished to accomplish by his will.

In the last case cited it is said :

"It is very certain that in England the power of alienation is considered an inseparable incident to the right of property in anything. Whatever a man owns, he can transfer * * * * * * An individual disposed to provide for an improvident son or relation,

limits the interest intended to be granted to him for his sole use during his life, and provides that his interest shall be forfeited if he transfers or assigns, or if he should be taken for his debts; in either case it is limited over and reverts. But by this means, the creditor, the alienee and the object of the bounty, lose the benefit of the devise or gift. Here, however, (Pennsylvania) the donation is preserved to the recipient, upon the terms and limitations on which it is given. And the kindliest feelings of our nature are sanctioned, by enabling a benefactor to provide for an unfortunate or improvident person by means which are his own, and which he ought to be permitted to apply as he pleases, for the support of those whose appeal to him is but the voice of nature softened by infirmity or misfortune, and which needs to be guarded and controlled, to be checked always, however, by the rules adopted for the prevention of perpetuities."

This doctrine seems to be founded upon a sentimental partiality for the comfort of a spendthrift of luxurious habits, rather than upon a proper appreciation of the true objects of property interests, the logic of the law, or a just regard for the conceded rights of a judgment creditor, and possibly had its origin in a not unusual feeling of personal enmity toward creditors as a class, incident to the unpleasant experiences of the earlier years of some of our profession.

A more wholesome doctrine, it seems to me, is that announced by Mr. Justice Swayne, that it is contrary to the spirit of the law to permit a person, however strongly prompted by parental affection, to secure to an interest "the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors."

In the state of Ohio, a provision in a will that the interest of the beneficiary should not be subjected to the payment of his debts, would be, in the presence of the statute above quoted, as inoperative as would a provision in a will of a Pennsylvanian by which it was attempted to create a perpetuity.

Giving a discretionary power to a trustee, does not exempt the interest of the beneficiary from being subjected to the payment of a judgment.

In Colton vs. Colton, cited above, the learned justice who delivered the opinion, says :

"It is quite true that where the manner of executing a trust is left to the discretion of the trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power; so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees.

But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real or personal security, and the trust fund is outstanding upon any hazardous security. Lewin, Trusts, 4th Eng. ed. chap. 20, sections 2, 402, 403.

In the case of Costabadie vs. Costabadie, 6 Hare, 410, 414, Vice Chancellor Sir James Wigram said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have; that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy." But it is always for the conrt eventually to say, when called upon, whether the discretion has been either cxercised at all, or exercised honestly and in good faith. Re Hodges, Davey vs. Ward, L. R. 7 Ch. Div. 754. Plainly, if the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account

be defeated, unless by its terms it is made dependent upon the will of the trustee himself."

In Marshall, trustee, vs. Rash, 87 Ky., 116, it is said:

"Although a discretion may be given to the trustee in the management and control of an estate and as to the amount of profits therefrom to be paid, and in the manner of paying them to the person for whose use and benefit it is held, the right of creditors is not thereby impaired. For such discretion is to be reasonable and in good faith exercised for the benefit of the beneficiary of the estate and incidentally for the protection of his creditors, and is always subject to the control of a court of equity."

See also Perry on Trusts, sections 386 a, 386 b, Butler 388.

The opinion filed in the court below is inconsistent with itself. At the top of page 195 of the record it is said "Cassius and his family are distinctly made the beneficiaries as to one-half of the income," and again on the same page, "In this case we are dealing with a devise, not to Cassius charged with a trust, but to the defendant Brooks, who is to apply and expend the income for the benefit of "Cassius and his family." And yet again on page 201 of the Record, "Under such a trust Cassius has no vested separable interest as can be reached by his creditors. That which is given to him is not the income of the fund, or any separable part of the income. The

trust, apart from the absolutely discretionary powers of the executor, is for his maintenance and support. *This is all he can compel the executor to furnish.*"

It is certainly the law of the land as announced by this court, that if there is an enforcible trust the creditor of the *cestui qui trust* may subject it to the payment of his judgment.

The idea of the court below seems to be that because Cassius and his family are joint beneficiaries, the interest of Cassius cannot be separated, and therefore cannot be subjected to the payment of a creditor's judgment. But this position is untenable, unless the court first find that the interest of Cassius and his family in the income of the estate was limited to a support only.

Perry on Trust, Sec. 18.

Nichols, assignee, vs. Eaton, 91 U. S., p. 223.

But this limitation cannot be found in the will.

The income is disposed of completely by the provision contained in the eighth item of the will, in the language following:

"I desire the income of my estate each year to be applied as follows:"

There is no hint even of an unapplied balance of income.

Again, "I desire the remainder of the yearly income or increase of my estate that shall be collected or received to be divided into two equal parts; one part to be ex-

pended * * * for the benefit of Cassius and his family; * * * the other I direct my executor to spend for the benefit of * * * children of Arrial."

While discretion is given to the trustee as to the amount to be annually expended for these beneficiaries, it is made imperative that the unexpended balance should be invested for the benefit of the person from whom it was withheld. At the end of item eight it is provided * * * "and if in the judgment of my said executor the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family, and the children of Arrial, as hereinbefore described, I authorize and *direct* my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made, for the benefit of the *child* or grandchild who would be entitled to it under the foregoing plan of distribution."

It is suggested by the court below in its opinion that, because the trustee has failed to follow this direction and has not invested the surplus for the benefit of Cassius, the right of the complainant is defeated.

The only comment appropriate to this suggestion is the elementary principle that equity regards as done what ought to have been done.

No better or more cogent reasoning can be given for the existence of error in the holding of the Circuit Court of Appeals than that furnished by the decision of the

learned circuit judge who originally decided the cause. (R. p. 168.)

In conclusion, the Circuit Court of Appeals, in its decision, has found :

1st. That Cassius has an interest given him by the will which he could enforce in his own behalf by suit ;

2d. That the testator intended that Cassius and his family should be entitled to support only out of the income of the estate, and that the unexpended balance of one-half the income devoted to Cassius and his family, should go over to the children of Arrial, in direct contradiction of the provision that it should be *invested* for Cassius and his family ;

3d. That a discretion to expend and a *direction* to invest is a discretion to expend, and a limitation over to another ;

4th. That the testator intended to create a trust by which the claims of creditors would be defeated without in any way expressing such intention ;

5th. That the mere fact that Cassius was insolvent and improvident is enough from which to presume that his father desired him to remain so.

It is respectfully submitted that the record shows that the decision complained of is contrary to the holdings of this court, and the law of the land, and is subversive of justice, and that it is a question of the gravest importance whether an inferior federal court can deny to

creditors of beneficiaries under trusts, rights which have been assured to them by an unvarying line of decisions of the courts of Great Britain and of this tribunal.

FRANCIS J. WING,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1892.

No. 1147.

J. TWING BROOKS, EXECUTOR AND TRUSTEE OF THE ESTATE OF ROBERT HANNA, DECEASED, APPELLANT,

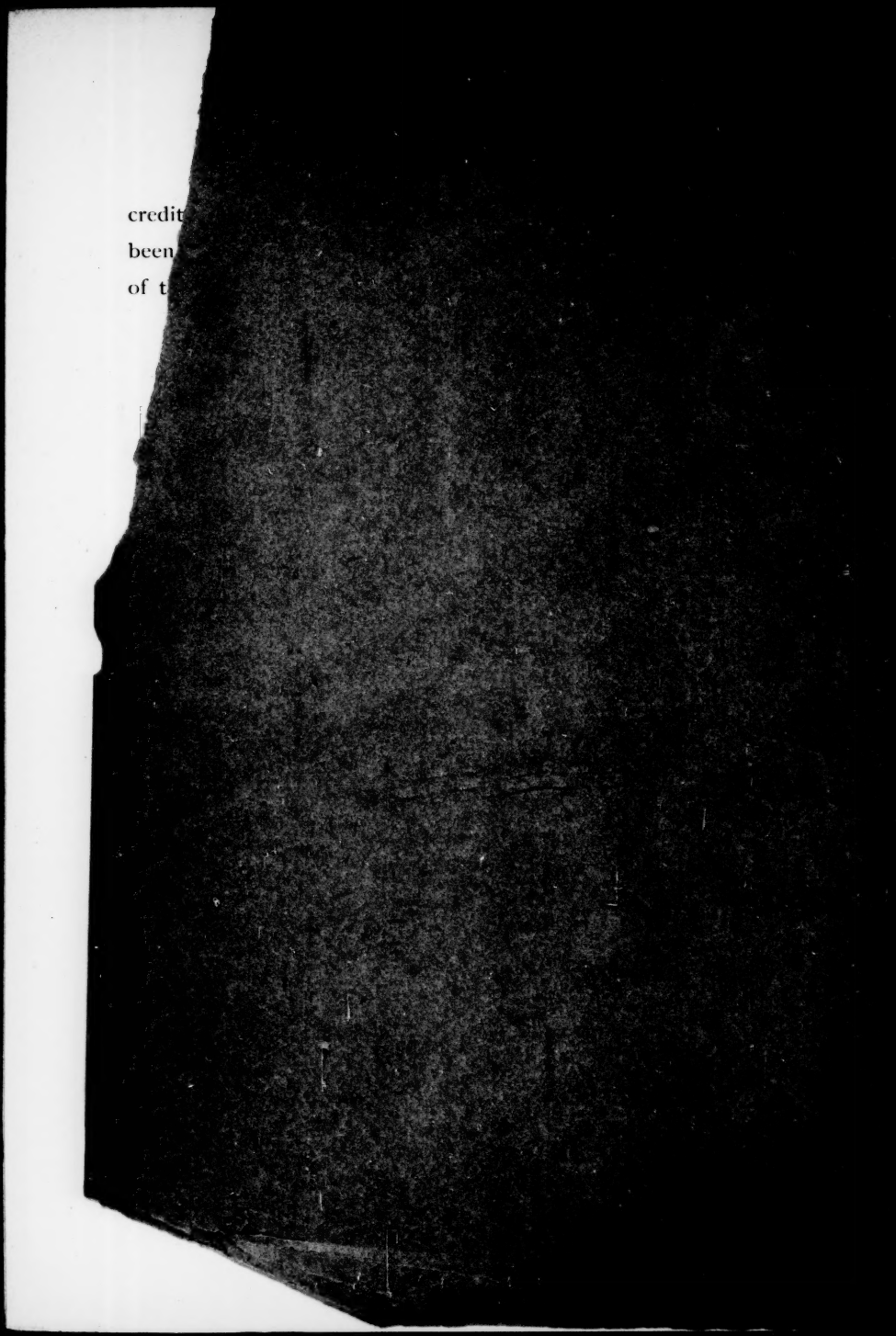
vs.

F. A. RAYNOLDS.

Suggestion in Opposition to the Application for a Writ of Certiorari.

LAWRENCE MAXWELL, JR.,
Counsel for J. Twing Brooks, Executor and Trustee.

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vs.

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Suggestion in Opposition to the Application for a Writ of Certiorari.

This case presents simply the question of the construction of a will, it being contended by the plaintiff that the testator intended to give to his son Cassius a definite or apportionable interest or estate in a certain trust fund, while it is insisted by the defendant that the trust was for the maintenance, education, and support of Cassius and his family collectively, with discretionary power in the trustee to control the method and amount of the expenditure.

Aside from this pure question of the construction of this particular instrument, which must be determined from the

language used by the testator, read in the light of the circumstances by which he was surrounded at the time and which are disclosed by the context of the will, there is no point of law involved in the case, certainly none of general interest or importance, which would justify a writ of certiorari to bring up for review the unanimous judgment of the circuit court of appeals. I respectfully submit that the application should be denied.

LAWRENCE MAXWELL, JR.,
Counsel for J. Twing Brooks, Executor and Trustee.